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In The
Supreme Court of the United States

KRIST NIKOLBIBAJ, LINDITA NIKOLBIBIAJ, AND DONIKA NIKOLBIBAJ,
Petitioners,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioners filed a motion to reopen claiming that they received ineffective assistance of counsel in their asylum proceedings. Consistent with agency precedent, they notified their previous attorney of their allegations. Did the Sixth Circuit disregard agency and federal court precedent when it found that they did not give their previous attorney sufficient time to respond when that attorney never responded?

2. Other than the Sixth Circuit, the other circuit courts of appeal to address the issue permit substantial compliance with the procedural requirements for alleging ineffective assistance of counsel in immigration proceedings if the noncitizens have satisfied the underlying purposes of those requirements. Did the Sixth Circuit err by requiring "slavish adherence" to those requirements?

3. The Sixth Circuit denied Petitioners' petitions for review after concluding that they did not show that, but for their attorneys' mistakes, they would have been allowed to remain in the United States. Did the Sixth Circuit impose too high a burden and create a circuit split where the other courts of appeals and the agency require noncitizens to show only a reasonable probability of a different outcome?

TABLE OF CONTENTS

pages

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Relevant Provisions Involved 2

Statement 4

Reasons For Granting The Writ 12

I. Ineffective Assistance Of Counsel In Removal Proceedings Implicates Due Process And Fundamental Fairness Concerns. 13

II. The Decision Of The Sixth Circuit Conflicts With Those Of Other Circuits Permitting Substantial Compliance With Procedural Requirements For Alleging Ineffective Assistance of Counsel And It Imposes An Unreasonable and Vague Burden. 16

III. The Ineffective Assistance Of Counsel Prejudiced Petitioners But The Sixth Circuit Imposed An Impossibly High Burden 19

IV. The Ineffective Assistance Of Counsel Prejudiced Petitioners And Deprived Them Of Meaningful Review Of Their Meritorious Asylum Claim 21

Conclusion 24

Appendix

A – Order Denying Rehearing (1/17/08) A1

B – Circuit Court Opinion (8/10/07) B1

C – Decision of the Board of Immigration Appeals (5/4/06) C1

D – Decision of the Board of Immigration Appeals (2/21/06) D1

E – Decision of the Board of Immigration Appeals (11/22/05) E1

F – Decision of the Board of Immigration Appeals (7/28/05) F1

G – Oral Decision of the Immigration Judge (5/14/04) G1

TABLE OF AUTHORITIES

Cases **Pages**

Ardestani v. INS, 502 U.S. 129 (1991) 13

Barry v. Gonzales,
445 F.3d 741 (4th Cir. 2006) 12, 18

Dakane v. Attorney General, 399 F.3d 1269
(11th Cir. 2005) 12-13, 18, 20-21

Fadiga v. Attorney General,
488 F.3d 142 (3d Cir. 2007) 12, 20

Gonzales v. Thomas, 547 U.S. 183 (2006) 21

Grigoryan v. Mukasey, 515 F.3d 999
(9th Cir. 2008) 12, 20-21

Habchy v. Gonzales,
471 F.3d 858 (8th Cir. 2006) 12, 18

Kenyeres v. Ashcroft, 538 U.S. 1301 (2003) 14

Lu v. Ashcroft,
259 F.3d 127 (3d Cir. 2001) 12, 18

Matter of Assaad,
23 I. & N. Dec. 553 (BIA 2003) 13, 20

Matter of Lozada,
19 I. & N. Dec. 637 (BIA 1988) . . . . . *passim*

Matter of Y-L,
24 I. & N. Dec. 151 (BIA 2007) 14

Obleshchenko v. Ashcroft,
392 F.3d 970 (8th Cir. 2004) 13, 20

Ramirez v. Gonzales, 2007 WL 2694012
(6th Cir. Sept. 14, 2007) 18

Rojas-Garcia v. Ashcroft,
339 F.3d 814 (9th Cir. 2001) 12, 18

Sako v. Gonzales, 434 F.3d 857
(6th Cir. 2006) 13, 18, 20

Scorteanu v. INS,
339 F.3d 407 (6th Cir. 2003) 17

Xue v. BIA,
439 F.3d 111 (2d Cir. 2006) 15

Yang v. Gonzales,
478 F.3d 133 (2d Cir. 2007) 12, 18

Zhang v. Gonzales,
452 F.3d 167 (2d Cir. 2006) 21

Statutes **Pages**

8 U.S.C. § 1158(a)(2)(B) 19, 22

8 U.S.C. § 1252(a)(2)(B)(ii) 14

8 U.S.C. § 1252(b)(4)(D) 14

28 U.S.C. § 1254(1) 2

Regulations **Pages**

8 C.F.R. § 1003.2(b)(2) 17

8 C.F.R. § 1003.2(c)(2) 17

Other Authorities **Pages**

Pub. L. No. 107-296, 116 Stat. 2135 8

PETITION FOR WRIT OF CERTIORARI

Petitioners Krist Nikollbibaj, Donika Nikollbibaj, and Lindita Nikollbibaj respectfully petition that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on August 10, 2007, and January 17, 2008, respectively. The Sixth Circuit decision conflicts with decisions from the Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits, which permit substantial compliance with the procedural requirements for claiming ineffective assistance of counsel in removal proceedings and where Petitioners complied with the agency's requirements.

The Sixth Circuit, in conflict with the Third, Fifth, Eighth, Ninth, and Eleventh Circuits, required Petitioners to show that, but for their previous attorneys' errors, they would have been permitted to remain in the United States. This impossibly high standard is in conflict with decisions from other circuits and the agency., which only require noncitizens to show a reasonable probability that the errors affected the outcome.

The Petitioners' previous attorneys failed to timely file their asylum application, failed to file a brief on appeal, and failed to file a procedurally correct motion to reopen, resulting in the summary dismissal of their claim on procedural grounds.

OPINIONS BELOW

The opinion and orders of the Sixth Circuit Court of Appeals, App., *infra*, A1 and B1, are unreported. The opinions of the Board of Immigration Appeals, App., *infra*, C1 through F1, are unreported. The oral decision of the Immigration Judge, App., *infra*, G1, is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, B1, was entered on August 10, 2007. The court denied Petitioner's timely petition for rehearing on January, 17, 2008, App., *infra*, A1. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

At all times relevant to this case, 8 U.S.C. § 1158 provided in relevant part:

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status,

may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

...

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

At all times relevant to this case, 8 U.S.C. § 1252 provided in relevant part:

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

...

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the

authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

...

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

...

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

STATEMENT

(i) Nature of the Case

This case presents two important and recurring questions. The first is how much of an opportunity must a noncitizen give his previous attorney to respond to an allegation of ineffective assistance of counsel, where the attorney had two months to respond before the agency issued a decision, the attorney is facing criminal and disciplinary proceedings resulting from his representation of other noncitizens, and agency and federal court precedent have never before imposed a specific timetable. The second question is

whether an aggrieved noncitizen must show that, but for the previous attorney's mistakes, he would have won his case or whether, consistent with precedent from the agency and other circuits, the noncitizen must show only a reasonably probability of success or substantial prejudice.

(ii) Factual Background

Mr. Krist Nikollbibaj, his wife Lindita Nikollbibaj, and their daughter Donika Nikollbibaj ("Donika") are Serbian citizens from the newly independent country of Kosovo.[1] On December 31, 1998, they were admitted to the United States after presenting Slovenian passports.

Mr. Nikollbibaj was born on April 10, 1971 in Gjakove[2], Kosovo. After he graduated high school in 1989, he completed one year of military service. He married Mrs. Nikollbibaj in 1995. Donika was born in Kosovo and their son, Daniel, was born in the United States.

When he completed his military service, he returned home and began working with the Democratic League ("LDK"). The goal of the LDK was to liberate Kosovo through peaceful means.

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[1] Kosovo, over Serbian objections, declared its independence on February 17, 2008. https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html (last visited April 9, 2008). It is not clear if Petitioners are citizens of Kosovo or Serbia.

[2] Gjakove is called Djakovica by Serbia.

He helped his brother Xhevalin distribute the LDK literature. After Xhevalin came to America in 1992, Mr. Nikollbibaj formally joined the group and eventually became a party leader for his village. Before the war with Serbia started, most of the village belonged to the LDK and they held several secret meetings a week.

When Mr. Nikollbibaj was young, the police came to their house looking for his older brothers. They slapped him and questioned him about his brothers' activities. While distributing supplies and literature for the LDK, Mr. Nikollbibaj was arrested and severely beaten on January 23 and June 7, 1998.

The last time the police came, in July of 1998, they tore his wife's shirt off. They threatened to do anything they wanted to unless he divulged the names of his political associates. The police arrested him and raped his wife in front of Donika. A week later, he and his family left Kosovo.

Before he left Kosovo, the Kosovo Liberation Army ("KLA"), the ethnic Albanian guerilla army that fought Serbia, tried to recruit him. He refused because he wanted a peaceful solution to Kosovo's problems and did not support the KLA's violent political agenda. Even though he did not join the group, the Serbian police sometimes accused him of supporting the KLA. The KLA declared him to be a deserter.

They went from Kosovo to Hungary. Mr. Nikollbibaj was afraid to remain in Hungary because he thought he would be sent back to Kosovo. Two weeks later, they went to Austria. They applied for asylum in Austria but their application was denied. They remained in Austria for about five or six months and then came to the United States, where Mr. Nikollbibaj's brothers, Vitor and Xhevalin, could help him. Vitor came to the United States seeking asylum in 1985 and he is now a lawful permanent resident.

Although he fled in fear of the Serbians, he is afraid to return to Kosovo because the KLA has targeted those who did not join them. Mr. Nikollbibaj will be viewed as a traitor and Serb-collaborator.

Serb violence against ethnic Albanians in Kosovo reached genocidal proportions. Serbian forces went from town to town, murdering dozens or even hundreds of civilians in each town. Gjakove was the sight of mass murder and ethnic cleansing by the Serbians.

The State Department reported that political killings continued into 2003. Among those killed or attacked were several prominent LDK officials, witnesses who testified against KLA members, and police officers who investigated the KLA. The KLA was responsible for killing Albanian "collaborators" and it targeted rival political organizations, such as the LDK.

When the Serbian forces withdrew from Gjakove, ethnic Albanians quickly filled the gap. There were numerous allegations that these security forces, which consisted of the former KLA members, attacked minorities and ethnic Albanians who were deemed to be insufficiently loyal to the forces. These security forces targeted Catholic Albanians and other perceived enemies in Gjakove. Gjakove had the largest Catholic population in Kosovo and they suffered harassment and intimidation following the war.

(iii) Agency Proceedings

Mr. Nikollbibaj hired David Paruch, a Michigan attorney, to file their asylum application. Mr. Paruch timely filed the application on December 30, 1999, but the Immigration and Naturalization Service ("INS")[3] returned it to him because he did not submit enough copies. Mr. Paruch resubmitted the application on January 6, 2000. The INS again returned the application. Mr. Paruch did not resubmit it until September 17, 2001.

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[3] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

On November 8, 2001, the INS referred the asylum application to the Detroit Immigration Court because the Petitioners entered the United States under the Visa Waiver program. On May 14, 2004, following a merits hearing, the Immigration Judge ("IJ") denied their applications and ordered them removed. The IJ concluded that they were barred from asylum because they were firmly resettled in Austria and did not file their application within one year of entering the United States. The IJ also concluded that (1) they were not credible, (2) their claim lacked corroboration, (3) they did not suffer past persecution, and (4) they lacked a well-founded fear of future persecution. App. G1.

Still represented by Mr. Paruch, Petitioners timely appealed to the Board of Immigration Appeals ("BIA"). Mr. Paruch sought, and obtained, an extension of the briefing deadline but failed to file a timely brief to the BIA. The BIA summarily dismissed Mr. Nikollbibaj's appeal solely because Mr. Paruch did not file a brief. The BIA did not address the merits of the appeal. App. F1.

Mr. Paruch moved the BIA to reopen and accept his late brief. He asserted that he missed the filing deadline because he was being treated for prostrate cancer. The BIA denied this motion on November 22, 2005, concluding that it was time barred and that its initial decision was proper given the failure to file a timely brief. App. E1.

Mr. Nikollbibaj hired Alexander Azzam. At the time, and unbeknownst to Mr. Nikollbibaj, the State of Massachusetts and the BIA had suspended him from practicing law.[4] On December 20, 2005, after being reinstated to practice, Mr. Azzam filed a motion to reopen with the BIA. He also petitioned the Sixth Circuit for review of the BIA's November 22, 2005 decision.[5]

The BIA denied Mr. Azzam's motion on February 21, 2006, as number barred and because he did not submit proof that he complied with the procedural requirements for making a claim of ineffective assistance of counsel against Mr. Paruch. The BIA did not address the merits of the claim. App. D1. The odd thing about Mr. Azzam's conduct is that he complied with the procedural requirements for making an ineffective assistance of counsel claim but never submitted the proof to the BIA, even after the Department of Homeland Security ("DHS") noted the absence of the evidence.

Mr. Nikollbibaj hired current counsel, who filed a motion to reopen with the BIA alleging that he was prejudiced by Mr. Paruch and Mr. Azzam's ineffective assistance of counsel. The BIA denied this motion on May 4, 2006. The BIA concluded that the motion was number barred and that they

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[4] Mr. Azzam has since been convicted of defrauding his clients in the Washtenaw County, Michigan circuit court and is facing disciplinary proceedings in Massachusetts.

[5] As a further example of Mr. Azzam's misconduct, he omitted Donika Nikollbibaj from the petition for review. The court refused to add her to that petition for review.

did not satisfy the procedural requirements for making an ineffective assistance of counsel claim against Mr. Azzam because although they notified him of their allegations, they did not provide him with sufficient time to respond. The BIA also asserted that when they denied Mr. Azzam's the motion, they considered the merits of the ineffective assistance claim made against Mr. Paruch. App. C1.

Mr. Nikollbibaj timely appealed from the BIA's denial of his three motions. The Sixth Circuit consolidated the three petitions for review.

(iv) The Sixth Circuit's Decision

On August 10, 2007, the Court denied the petitions for review. Nikollbibaj v. Gonzales, Nos. 05-4584, 06-3330, 06-3705 (6th Cir. Aug. 10, 2007) (App. B1). The court affirmed the BIA's denial of the first two motions to reopen because the decisions were in accordance with the BIA's regulations and procedural rules. Id. at 12-14. The court upheld the denial of the third motion to reopen because Mr. Azzam did not receive enough time to respond to the ineffective assistance of counsel claim. Id. at 15. Finally, the court found that the ineffective assistance did not prejudice Petitioners because they could not show that they would have received asylum but for the ineffective assistance of counsel. Id. at 17.

The court denied their timely petition for rehearing on January 17, 2008. App. A1.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with the decisions of the other courts of appeal and with the agency itself. The other courts that have addressed the issue have found that substantial compliance with the procedural requirements for alleging ineffective assistance of counsel is sufficient, where the underlying purposes of those requirements have been met. See Yang v. Gonzales, 478 F.3d 133, 142-143 (2d Cir. 2007); Habchy v. Gonzales, 471 F.3d 858, 864 (8th Cir. 2006); Barry v. Gonzales, 445 F.3d 741, 746 (4th Cir. 2006); Dakane v. Attorney General, 399 F.3d 1269, 1272, n.3 (11th Cir. 2005); Rojas-Garcia v. Ashcroft, 339 F.3d 814, 824-25 (9th Cir. 2001); Lu v. Ashcroft, 259 F.3d 127, 133 (3d Cir. 2001). The Sixth Circuit and the BIA imposed, after the fact, a requirement that an aggrieved noncitizen give his former attorney an unknown amount of time to respond. This new requirement will make it impossible for noncitizens to act diligently and comply with statutory and regulatory deadlines. Furthermore, the attorney in this case, Mr. Azzam, had two months to respond and has not responded in over two years.

The Sixth Circuit's decision imposes a substantially higher burden than that imposed by every other circuit. See, e.g., Grigoryan v. Mukasey, 515 F.3d 999, 1003 (9th Cir. 2008); Fadiga v. Attorney General, 488 F.3d 142, 159 (3d Cir.

2007) (agreeing with the government that the proper standard is "reasonable likelihood" or "reasonable probability"); Dakane, 399 F.3d at 1274-75 (11th Cir. 2005); Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004). The Sixth Circuit has imposed an impossibly high burden of proving that but for the attorney's mistakes, the noncitizen would have been allowed to remain in the United States. See Sako v. Gonzales, 434 F.3d 857, 864 (6th Cir. 2006). When relief is discretionary, it is simply not possible for a noncitizen to prove this; especially where noncitizens with identical claims will receive different results from different adjudicators. Moreover, Mr. Paruch's failure to timely file their asylum application or file a brief and Mr. Azzam's failure to file a proper motion to reopen were per se prejudicial because these errors resulted in the denial of Petitioners' claims, not on the merits, but on procedural grounds.

I. Ineffective Assistance Of Counsel In Removal Proceedings Implicates Due Process And Fundamental Fairness Concerns

Although there is no right to appointed counsel, the BIA and all of the federal courts have found that ineffective assistance of counsel could infringe upon a noncitizens' right to a full and fair hearing if the ineffective assistance prevented the noncitizen from "meaningfully presenting his or her case." Matter of Assaad, 23 I. & N. Dec. 553, 558 (BIA 2003) (collecting cases). "We are mindful that the complexity of immigration procedures, and the

enormity of the interests at stake, make legal representation in deportation proceedings especially important." Ardestani v. INS, 502 U.S. 129, 138 (1991). The harmful effect of ineffective assistance of counsel is especially felt in the asylum context where the wrongful denial of asylum results in the return of a refugee to the country of persecution and possible death or torture.

> An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped.

Kenyeres v. Ashcroft, 538 U.S. 1301, 1305 (2003) (J. Kennedy).

By their nature, asylum proceedings are cooperative, not adversarial, and the BIA has recognized that adjudicators have a duty to assist applicants in putting forth their claims. Matter of Y-L, 24 I. & N. Dec. 151, 161-62 (BIA 2007). Congress has protected the right of asylum seekers to seek judicial review of even discretionary denials at a time when it has otherwise limited the availability of other noncitizens to seek recourse in federal courts. 8 U.S.C. §§ 1252(a)(2)(B)(ii), (b)(4)(D).

> Asylum petitions of aliens seeking refuge from alleged persecution are among the hardest cases faced by our courts. They are not games. And, despite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention ... to which all litigants are entitled. We should not forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application, concluding that an immigrant's story is fabricated when, in fact, it is real, we risk condemning an individual to persecution ... we must always remember the toll that is paid if and when we err."

Xue v. BIA, 439 F.3d 111, 113-14 (2d Cir. 2006) (internal footnotes and citations omitted).

The agency has held that ineffective assistance of counsel can violate a noncitizens' due process right to a full and fair hearing when it results in prejudice. The federal courts have agreed with the agency's conclusion because of the important due process rights at stake and the consequences of deporting a noncitizen, especially a refugee.

II. The Decision Of The Sixth Circuit Conflicts With Those Of Other Circuits Permitting Substantial Compliance With Procedural Requirements For Alleging Ineffective Assistance of Counsel And It Imposes An Unreasonable and Vague Burden

The BIA has established a procedure for noncitizens to follow when alleging ineffective assistance of counsel. In Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988), the BIA held that a noncitizen alleging ineffective assistance of counsel must (1) submit an affidavit attesting to the relevant facts, (2) the noncitizen must notify previous counsel of the allegations and give the attorney an opportunity to respond, and (3) include proof that a complaint was filed with the appropriate disciplinary authorities or an explanation as to why none was filed. Id. at 639. The purpose of these requirements is to allow the BIA to assess the substance of the allegations, weed out meritless claims, allow an attorney whose reputation has been besmirched to respond, and to highlight the standards which should be expected of attorneys in immigration proceedings. Id.

It is undisputed that Mr. Nikollbibaj satisfied these requirements against Mr. Paruch and at least two of the three requirements against Mr. Azzam. The issue is whether he gave Mr.

Azzam sufficient opportunity to respond to the allegations. App. B1.

The Sixth Circuit concluded that Mr. Nikollbibaj did not provide Mr. Azzam with sufficient opportunity to respond. Nikollbibaj, *supra*, at 15. Mr. Nikollbibaj notified Mr. Azzam of the allegations on March 15, 2006 at the same time he filed his motion to reopen with the BIA. Mr. Azzam did not respond in the two months it took the BIA to decide the motion and, to date, Mr. Azzam has never responded. He also has not responded to the bar complaint filed in Massachusetts, where he is licensed, even though the disciplinary authorities have brought formal charges against him. He has since been convicted of defrauding his clients in the Washtenaw County, Michigan, circuit court.

The BIA and the Sixth Circuit did not state how long an alien must wait after notifying the attorney before filing a motion to reopen. Without a more definite rule, aliens risk waiting too long and thereby having their motions to reopen denied on timeliness grounds.

In this case, if Mr. Nikollbibaj waited for Mr. Azzam to respond, he would have missed the 30 day filing deadline for filing a motion to reconsider and the 90 day deadline for filing a motion to reopen. 8 C.F.R. §§ 1003.2(b)(2), (c)(2). For example, it took Mr. Paruch two months to respond to the complaint filed against him by Mr. Azzam. If Mr. Nikollbibaj waited two months for Mr. Azzam

to respond, the BIA would have denied his motion because he failed to exercise due diligence. Scorteanu v. INS, 339 F.3d 407, 414 (6th Cir. 2003) (denying petition for review because the alien did not exercise due diligence where he delayed filing a motion to reopen while trying to locate his previous attorney to obtain a response to the bar complaint).

Prior Sixth Circuit jurisprudence did not impose on noncitizen a duty to give the previous attorney an opportunity to respond as long as the attorney is notified of the allegations. Sako, 434 F.3d at 863. In Ramirez v. Gonzales, 2007 WL 2694012, No. 06-3679 at *7 (6th Cir. Sept. 14, 2007), the court noted that aliens do not have to wait until they receive a response from the disciplinary authorities before filing a motion to reopen.

Other circuit courts of appeal have rejected a "slavish adherence" to the Lozada requirements. These courts permit substantial compliance with those requirements so long as their purpose is satisfied. See Yang, 478 F.3d at 142-143 (2d Cir. 2007); Habchy, 471 F.3d at 864 (8th Cir. 2006); Barry, 445 F.3d at 746 (4th Cir. 2006); Dakane, 399 F.3d at 1272, n.3 (11th Cir. 2005); Rojas-Garcia, 339 F.3d at 824-25 (9th Cir. 2001); Lu, 259 F.3d at 133 (3d Cir. 2001).

In this case, Mr. Nikollbibaj satisfied Lozada's purposes, if not perfectly, then substantially. His previous attorneys and the state bar associations were put on notice of their

mistakes, which Mr. Nikollbibaj detailed in his affidavit and supported with witness affidavits.

Both attorneys had an opportunity to respond during the agency proceedings but Mr. Azzam never did. Had he done so, his response would have been made part of the record. His recent performance in this and other cases has since been the subject of criminal prosecution and state disciplinary proceedings.

Many of the mistakes in this case were clear: the missing of the one year asylum deadline (8 U.S.C. § 1158(a)(2)(B)) for failure to file the proper number of copies, the summary dismissal of the appeal for failure to file a brief, and the summary dismissal of a motion to reopen for failure to include readily available proof of compliance with Lozada.

After the fact and in disregard, not only for agency and Sixth Circuit precedence, but decisions from other circuit courts of appeal, the BIA and the Sixth Circuit erroneously concluded that Petitioners failed to comply with Lozada because they did not give Mr. Azzam sufficient time to respond to their allegations. This conclusion is in error and deprived Petitioners of administrative and judicial appellate review of their asylum claim, which they were entitled to as a matter of right.

III. The Ineffective Assistance Of Counsel Prejudiced Petitioners But The Sixth

Circuit Imposed An Impossibly High Burden

The Sixth Circuit imposed too high a standard for evaluating whether Petitioners were prejudiced. It is impossible for noncitizens to show that, but for the mistakes, they would have been entitled to remain in the United States where entitlement to relief is discretionary and turns on a variety of subjective factors. Nikollbibaj, *supra*, at 17 (App. B1); see also Sako, 434 F.3d at 864.

The Sixth Circuit's rule is much stricter than that adopted by the agency. While the BIA has not specified an exact standard for showing prejudice, it has cited favorably to case law requiring a showing of "substantial prejudice." Assaad, 23 I. & N. Dec. at 561-62. Ineffective assistance of counsel results in a due process violation if it prevents an alien from "reasonably presenting his case." Lozada, 19 I. & N. Dec. at 638.

Moreover, most, if not all, of the circuit courts of appeal have adopted the "reasonable probability" or "substantial prejudice" standard. See Grigoryan, 515 F.3d at 1003 n.1 (9th Cir. 2008) ("reasonable likelihood"); Fadiga, 488 F.3d at 159 (3d Cir. 2007) (agreeing with the government that the proper standard is "reasonable likelihood" or "reasonable probability"); Dakane, 399 F.3d at 1274-75 (11th Cir.) (same); Obleshchenko, 392 F.3d at 972 (8th Cir. 2004) (same). Counsel is not aware of any other circuits applying as high a standard as the Sixth Circuit.

Several circuits, in fact, have presumed prejudice where, as here, counsel fails to file an appellate brief. Grigoryan, 515 F.3d at 1003-04; Dakane, 399 F.3d at 1274-75. These courts have held that the denial of appellate proceedings entirely is per se prejudicial. Grigoryan, 515 F.3d at 1004-05; Dakane, 399 F.3d at 1274-75.

In the asylum context, it is especially difficult for noncitizens to show that they would have received asylum but for their attorneys' mistakes because asylum law involves many subjective determinations and different adjudicators may reach different conclusions on the same set of facts. See, e.g., Zhang v. Gonzales, 452 F.3d 167, 173-74 (2d Cir. 2006) (family members with similar claims received different decisions on their asylum applications). When the BIA has not considered the merits of an asylum claim or explained why it has denied the application, a federal court cannot determine if the alien would have received asylum but for the ineffective assistance of counsel without overstepping its authority as an appellate body. Gonzales v. Thomas, 547 U.S. 183, 186-87 (2006).

IV. The Ineffective Assistance Of Counsel Prejudiced Petitioners And Deprived Them Of Meaningful Review Of Their Meritorious Asylum Claim

The many mistakes in this case, individually and in the aggregate, deprived Petitioners of due

process and prevented them reasonably presenting their case. Petitioners are from Gjakove, Kosovo, the scene of Serbia's campaign of genocide, as confirmed by the Federal Bureau of Investigation. Mr. Nikollbibaj's brother, Xhevalin, was granted asylum in the United States.

Mr. Paruch tried, but failed to, timely file their asylum application. The INS twice rejected the application because Mr. Paruch did not include enough copies. As a result, the IJ found their application time-barred under 8 U.S.C. § 1158(a)(2)(B).

Mr. Paruch then failed to file a brief to the BIA, because he was in the hospital, resulting in the summary dismissal of Petitioners' appeal. App. F1. Had he filed a brief, he could have submitted Petitioners' rebuttal evidence and evidence of current country conditions. Because he did not file a brief, the BIA never reviewed the merits of the asylum claim.

Mr. Nikollbibaj turned to Mr. Azzam to remedy Mr. Paruch's mistakes but Mr. Azzam only compounded them. Mr. Azzam delayed taking action until his license to practice law was restored. Although Mr. Azzam satisfied the Lozada requirements against Mr. Paruch, he failed to provide proof to the BIA, even after the DHS noted the absence of evidence. As a result, the BIA denied the motion, not on the merits, but again on procedural issues. As a result, the BIA never considered the merits of Petitioners' claim that Mr.

Paruch provided ineffective assistance of counsel or that they suffered prejudice.

Petitioners were deprived of appellate review, not once, but twice, by incompetent counsel. The BIA and the Sixth Circuit had the authority, and duty, to remedy these due process violations, but they failed to do so. As a result, Krist Nikollbibaj, Lindita Nikollbibaj, and their daughter Donika, are facing imminent removal to the country that persecuted them.

CONCLUSION

Petitioners respectfully submit that the Sixth Circuit erred in the following respects:

Petitioners fully or substantially complied with the procedural requirements for alleging ineffective assistance of counsel.

The ineffective assistance of counsel prejudiced them by depriving them of the ability to apply for asylum and to have meaningful appellate review of their application and there is a reasonable likelihood that they would have been granted relief.

Therefore, Petitioners respectfully pray that the Court grant their petition for writ of certiorari and reverse the decisions of the Sixth Circuit Court of Appeals and the BIA.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying Rehearing,
filed 01/17/08 ..... A1 - A2

Opinion,
filed 08/10/07 ..... B1 - B38

BOARD OF IMMIGRATION FILINGS:

Decision of the Board of
Immigration Appeals,
filed 05/04/06 ..... C1 - C5

Decision of the Board of
Immigration Appeals,
filed 02/21/06 ..... D1 - D3

Decision of the Board of
Immigration Appeals,
filed 11/22/05 ..... E1 - E3

Decision of the Board of
Immigration Appeals
filed 07/28/05 ..... F1 - F2

Oral Decision and Order
of the Immigration Judge,
filed05/14/04 ..... G1 - G54

Nos. 05-4584/06-3330/3705

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KRIST NIKOLBIBAJ, ET AL.,
Petitioners,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,
Respondent.

ORDER

BEFORE: MARTIN, BATCHELDER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk
Leonard Green, Clerk

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Nos. 05-4584; 06-3330;06-3705

UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

KRIST NIKOLLBIBAJ, et al.,
Petitioners,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL
Respondent.

ON APPEAL FROM THE BOARD OF
IMMIGRATION APPEALS

BEFORE: MARTIN, BATCHELDER and
CLAY, Circuit Judges.

CLAY, Circuit Judge. Petitioner Krist Nikollbibaj, his wife, Lindita Nikollbibaj, and daughter, Donika Nikollbibaj (collectively, "Petitioners")[1] applied for 1) asylum under the

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[1]The record is unclear whether Petitioners' last name is "Nikolbibaj" or "Nikollbibaj." Compare J.A. 474 with J.A. 465. This opiriionuses "Nikollbibaj," the

Immigration and Nationality Act ("INA") § 208, 8 U.S.C. § 1158; 2) withholding of removal under INA § 241 (b)(3), 8 C.F.R. §208.16; and 3) protection under the United Nations Convention Against Torture ("Torture Convention"), 8 C.F.R. § 208.16. An Immigration Judge ("IJ") denied Petitioners' asylum applications on May 14, 2004. The Board of Immigration Appeals ("BIA") summarily dismissed Petitioners' appeal and denied three motions to reopen. Petitioners appeal the BIA's denial of the motions to reopen. For the reasons that follow, we **AFFIRM** the BIA's decision and **DENY** the petitions for review.

BACKGROUND

Petitioners are ethnic Albanians from Kosovo and Roman Catholics. Petitioner "completed the middle school and the high school .... [i]n 1989," (J.A. 369), and served for one year as a "foot soldier" in the army of the former Yugoslavia, (J.A. 371). He maintains that his older brothers, Xhevalin Nikollbibaj ("Xhevalin") and Vitor Nikollbibaj ("Vitor"), were actively involved in political activities in Kosovo.

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last name to appear in Petitioners' passports.

The record shows that "Serbian police authorities," (J.A. 350), arrested and interrogated Xhevalin for "believing [in] human rights for Albanian people[,] ... talking, [] spreading mail, [and] trying to convince people" to support Kosovo independence, (J.A. 351). In 1992, Xhevalin came to the United States and was granted asylum. Notably, after leaving Yugoslavia, Xhevalin was convicted *in absentia* of making public political statements:

> ... on April 18, 1992 at about 9 p.m. in the restaurant RINIA in Djakovica, in the presence of a considerable number of patrons, [Xhevalin] did shout the slogans: "Kosovo a Republic," "Kosovo Belongs to the Albanians," and "We will Not Tolerate Serbian Occupation, Because This Country Belongs Only to the Albanians," - thereby committing a criminal act against the foundations of the social system of socialist self-management and the security of the [Socialist Federal Republic of Yugoslavia] under Article 114 of the Yugoslav Criminal Code. Whereupon .... the court hereby SENTENCES the defendant Xhevalin [ ]to a term of 5 (five) years in prison.

(J.A. 476) (formatting added). Xhevalin's persecution in Kosovo, as a result of his political activities, is well established in the record.

With respect to Vitor, the record shows that he was involved with the Democratic League ("LDK"), a political party that "aim[s] [ ] to show to the world the massacres that [Albanian] people [have] suffered" in Kosovo. (J.A.372) Since the "former Yugoslavia was together, [ ] they used to call [LDK members] separatists" because LDK "wanted to separate Yugoslavia as a country." (J.A. 325) Vitor testified that he

> start[ed] writing slogans on buildings. [LDK] wrote slogans, slogans all over the place. [LDK] want[ed] to separate from Yugoslavia; [ ] [and] want[ed] Kosovo to be a republic. And so in the meantime, a lot of police from Serbia was transported, and they came, and they sent them into Kosovo, and they started investigating [LDK].... Sometimes they beat [LDK members], sometimes they let [LDK members] go, sometimes threaten[ed] ... to kill [LDK members].

(J.A.326-27) Vitor was arrested "two times from home," detained, interrogated, and beaten by the police. (J .A. 329) The record indicates that Vitor "left

[Kosovo] because of a Serb abusement (sic) that they did to ... [him] and [his] family, for... anti-government ideas that [they] had." (J.A. 324- 25) In 1985, Vitor came to the United States and applied for asylum, but became a "lawful permanent residen[t] through cancellation of removal before his asylum application was adjudicated." (Pet. Br. at 13; see also J.A.323-24)

Petitioner maintains that, like Xhevalin and Vitor, he joined LDK and became politically active. More specifically, he alleges that "[a]fter [he] completed military service ... [he] started to be involved with Democratic League." (J.A. 372) According to Petitioner,

> together with [his] brother Xhevalin, [he] [ ] spread ... papers. saying the Kosovo Republic. So, [he] helped [his] brother Xhevalin to distribute those papers .... [and] in 1992, [he] got the membership card of the Democratic League.

(J.A. 374) Although he does not provide specific details, Petitioner maintains that the Serbian police targeted him and frequently detained and interrogated him because of his brothers' and his own political activities. *See, e.g.*, J.A. 382 (Petitioner

alleges that Serbian police "question[ed] [him] a couple of times about [his] brothers.").

Petitioner alleges that, in the course of his involvement with LDK, "[he] was promoted" and became "head of the group for the village," or "leader of the Village." (J .A. 375) Petitioner affirms that he "led 10,000 LDK members in [his] village." (J.A.376) As a party leader, Petitioner's "duty was to tell the people ... to liberate Kosovo through peaceful means, not war:" *Id.* He held "secret meetings, and then, communicated with different people during those meetings." *Id.* With respect to these meetings, Petitioner testified ,as follows:

Question:	How often would you have these secret meetings?
Answer:	So there were about two, three days a week. During the difficult time when immediately before the war, then we had them more often.
Question:	How many people would be at each of these meetings?
Answer:	Around-sometimes there were 2,000, 3,000; sometimes there were 500, around 500. But most they were - some of them were scared of the police.
Question:	Where would you have these meetings?
Answer:	Sometimes we had them in secret places. Yeah, sometimes in the

> mountains where the police couldn't see us.

(J.A. 377) (formatting added).

Petitioner affirms that before leaving Kosovo, the Kosovo Liberation Army ("KLA"), an ethnic Albanian guerilla force fighting for Kosovo independence, "called on [him] and requested that [he] join them." (J.A.385) Although Petitioner didnotjoin the KLA "[b]ecause [he] [ ] was for peace, not war," (J.A. 3 86), the Setbian police "thought that [he was] also fight[ing] for KLA," (J.A. 400). Petitioner alleges that during his last encounter with the Serbian police, law enforcement officials "tore the shirt of [his] spouse off' and "told [him] that they were going to do anything with [his] wife ... [and] kill [his] wife," unless Petitioner disclosed "which party [he was] working for and who [he was] working with." (J.A. 383) During this encounter, Petitioner was allegedly detained and taken to a police station. While Petitioner was detained, Petitioner's wife was allegedly raped by five Serbian police officers in front of her daughter, mother-in-law, sister-in-law, and other family members. Petitioners fled Kosovo in July 1998, a week after the alleged rape.

Petitioners traveled from Kosovo to Hungary. Because they were "afraid that [Hungary] might turn

[them] back" to Kosovo, Petitioners traveled to Austria. (J.A. 384) They remained in Austria for "five, [or] six months," (J.A. 392), living in a camp for asylum applicants, "in a room where slept on 100- or 200 people," (J.A.415). Petitioners maintain that they applied for asylum, but Austria "denied [the] application for asylum." (J .A. 392) After the Austrian asylum applications were denied, Petitioners traveled "from Austria ... to Germany, and from Germany ... to Holland"' (J.A. 385) Finally, Petitioners entered the United States on December 31, 1998, with false "Slovenian passports" under the visa waiver program. (J.A. 385; *see also* 8 U.S.C. § 1187(a)). Petitioner maintains that "[i]f [he] get[s] back to Kosovo, the Serbs will get back, and the KLA is going after everyone who has left Kosovo and didn't fight against the Serbs." (J.A. 389) Essentially, Petitioner argues that he will be viewed as a traitor and Serb-collaborator, and that the KLA will target him because he refused to join the guerilla forces.

On December 30, 1999, Petitioners retained an attorney, David Paruch ("Paruch"), and applied for asylum.[2] Since the first asylum applications were

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[2]It is unclear whether Petitioners filed their first asylum applications on December 30, 1999, or

rejected by the INS, Petitioners re-submitted the applications on January 6, 2000. The second asylum applications were also rejected. Petitioners did not resubmit the applications until September 17, 2001. *See* J.A. 294 (IJ indicates that the record contains "an administratively filed application [for asylum] that was filed actually three times, or attempted to be filed three times.").

On November 8, 2001, Petitioners were served with a "Notice of Referral to Immigration Judge," (J.A. 509-14), pursuant to 8 C.F.R. § 208.2(b), because as aliens admitted under the visa waiver program, Petitioners waived the right "to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. § 1187(b). Petitioners appeared before an IJ and indicated that they were "seeking asylum and withholding [of removal] under the statute and the Torture Convention." (J.A. 293) Since the IJ was "not sure [he] even had a valid asylum application before the Court," Petitioners' were directed to "[f]ill out [a]

December 31, 1999. Since Petitioners filed their last asylum application on September 17, 2001, the exact date of the first filing is not relevant for purposes of this appeal.

new form .... [a]nd attempt to explain in that new form what happened" with their prior attempts to file the asylum application. (J.A.297)

The IJ held an evidentiary hearing on the merits of Petitioners' asylum applications on May 14, 2004. At the hearing, Petitioner, his wife and brothers testified about their alleged persecution in Kosovo. Compared to his brothers' accounts of their political activities and persecution, Petitioner's testimony was vague and conclusory. Petitioners also proffered expert testimony on "Kosovar government and politics or Balkan government and politics," (J.A. 429), from Bernd J. Fischer, Ph.D., a professor at Indiana University and Purdue University, (J.A. 457-64). Dr. Fischer testified that "the situation [in Kosovo] is rather chaotic" because "there was essentially [a] mini-civil war in Kosovo." (J.A.431) He explained that

> not only are there threats, there is' actual retribution .. Kosovo has a fairly high crime rate, and much of this crime is basically Albanian on Albanian crime; in other words, individuals who have taken it upon themselves to rid the ethnic Albanian community of individuals that they assume to be traitors.

(J.A.435) Dr. Fischer explained that the traitors are people who cooperated with Serbs during the war, those who were not sufficiently anti-Serb during the war, those who refused to participate in the war, those who left; and, on occasion, failed political asylum seekers." *Id.* Dr. Fischer testified that international and local law enforcement forces "are not particularly effective" in protecting the targets of these attacks. (J.A. 436)

At the hearing, Petitioners also submitted country condition reports from the United States Department of State indicating that "Serbian forces killed up to 10,000 mostly male ethnic Albanians, often in brutal fashion." (J.A.482) The reports indicate that in Kosovo "[v]irtually no town or settlement escaped the effects of Milosevic's campaign of ethnic cleaning, with reports of dozens, if not hundreds of civilians being murdered in each town." (J.A. 483)

At the conclusion of the evidentiary hearing, the IJ denied Petitioners' asylum applications, finding that Petitioners were ineligible for asylum because they "lived in Austria for five or six years," (J.A. 30), and "bec[a]me permanently resettled in

.Austria," (J.A. 31);[3] and that the applications were untimely because they were "ultimately not filed until September 17, 2001," (J.A. 32). The IJ "also reject[ed] the application on its merits," finding that Petitioners were not credible because they "cannot tell a consistent or a straight story." (J.A. 34)

Petitioners filed a timely notice of appeal to the BIA. Paruch filed a motion for an extension of time to "complete briefing of [the] issues" because "the Easter Holiday and associated family issues[ ] interfere[d] with timely submission of the brief." (J.A. 276) Although the BIA granted the motion, Petitioners failed to submit the brief by the April 20, 2005 deadline. On July 28, 2005, the BIA "summarily dismissed" Petitioners' appeal, for failure to file a brief, pursuant to 8 C.F.R. § 1003.1 (d)(2)(i)(E). (J .A. 270) Petitioners did not file a petition for review from the BIA's dismissal. On August 31, 2005, Petitioners filed a motion to reopen with the BIA, indicating that "at about the time th[e] briefwas due; [Paruch] underwent surgery for prostate cancer." (J.A. 258)

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[3] The IJ found that Petitioners lived in Austria for five or six years. However, Petitioners' testified that they lived in Austria for five or six months. *Compare* J.A. 30 *with* J.A. 392.

Indeed, the record indicates that Paruch had "Laparascopic Prostatectomy with Robotic Assistance for Prostate Ct [sic]." (J.A. 271)

On November 22, 2005, the BIA denied the motion to reopen. The BIA stated that "[i]nasmuch as it appears that the applicants are requesting that [the BIA] reconsider [the] prior decision ... the request for reconsideration was filed more than 30 days after [the] decision and, therefore, is untimely." (J.A. 12) The BIA acknowledged that Petitioners submitted "a hospital record showing that [Paruch] was admitted to the hospital on April 5, 2005, and discharged on April 7, 2005," but noted that the brief was due on April 20, 2005, and that Petitioners "d[id] not specify the length of the attorney's recovery period." *Id.* The BIA stated that "the motion does not explain why the applicants waited more than 4 months after the briefwas due to file the request to consider the late-filed brief." *Id.*

After the BIA denied the first motion to reopen, Petitioners retained new counsel, Hani Alex

Azzam[4] ("Azzam"), to file a second motion to reopen. On December 20, 2005, Azzam filed a motion to reopen Petitioners' asylum case with the BIA raising an ineffective assistance of counsel claim, and petitioned this Court to review the BIA's denial of the first motion to reopen.[5]

The BIA denied Azzam's motion on February 21, 2006, under 8 C.F.R. § 1003.2(c)(2), because "[t]he motion to reopen exceeds the numerical limitations for motions to reopen." (J .A. 10) The BIA also found that Petitioners "failed to meet the requirements for making an ineffective assistance of counsel claim."

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[4]The record shows that Azzam was "administratively suspended from the practice of law" in Massachusetts and with the BIA, from July 21, 2005, to October 26, 2005. (J.A. 164; *see also* J.A. 165) Petitioners concede that they did not know about Azzam's suspension. Since Petitioners engaged Azzam to file a new motion to reopen after the BIA denied the first motion to reopen on November 22, 2005, it does not appear that Azzam represented Petitioners while he was suspended.

[5] Since Azzam failed to include Petitioner's Wife in the petition for review to the Sixth Circuit, Petitioners filed a second petition for review.

Id. More specifically, Petitioners "failed to provide either an affidavit in support of their motion or any evidence that they have given former counsel an opportunity to respond to their allegations" of ineffective assistance of counsel. *Id.*

After the BIA denied Azzam's motion to reopen, Petitioners retained Marshal Hyman ("Hyman"), the attorney currently litigating this case, as counsel. Hyman filed a petition for review from the BIA's February 21, 2006 decision, and a motion to reopen with the BIA alleging that Petitioners were prejudiced by Paruch's and Azzam's ineffective assistance of counsel. The BIA denied this third motion to reopen on May 4, 2006, finding that it was "barred by numerical limitations." (J.A.8) The BIA stated that it had already "considered the arguments as to ineffective assistance of counsel ... regarding the actions of [ ] former attorney, [ ] Paruch ... and decline[d] to revisit" that issue. (J.A.7) The BIA also found that it could not address the issue of Azzam's ineffective assistance because Petitioners "failed to comply with [the] critical [ ] requirement" that "before allegations of ineffective assistance of former counsel are presented to the [BIA], former counsel must be informed of the allegations and allowed the opportunity to respond." (J .A. 8) (internal quotation

marks and citation omitted). Petitioners filed a timely petition of review with this Court.[6] On appeal, Petitioners argue that the BIA erroneously denied the three motions to reopen.

DISCUSSION

I. Standard of Review

This Court reviews the denial of a motion to reopen for an abuse of discretion. *See, e.g., INS v. Doherty*, 502 U.S. 314, 323 (1992); *see also INS v. Abudu*, 485 U.S. 94, 107 (1988) (holding that BIA reopening "decisions are subject to an abuse-of-discretion standard of review."). "The [BIA's] discretion is broad but it is not unlimited. It may not exercise its discretion in a way that is arbitrary, irrational or contrary to law." *Daneshvar v. Ashcroft*, 355 F 3d 615, 625-26 (6th Cir. 2004) (citations omitted). "Cursory, summary, or conclusory statements are inadequate" in BIA decisions. *Id.* (citations omitted). "'In determining whether the [BIA] abused its discretion, this Court must decide whether the denial of [the] motion to reopen ... was made without a rational explanation, inexplicably

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[6] This Court has consolidated the three petitions for review in this case .

departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particularrace or group.'" *Sako v. Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006) (quoting *Allabani v. Gonzales*, 402 F.3d 668, 675 (6th Cir. 2005)).

II. The Motions to Reopen

A. Statutory and Legal Framework

"The granting of a motion to reopen is [ ] discretionary, and the Attorney General has broad discretion to grant or deny such motions." *Doherty*, 502 U.S. at 323 (internal quotation marks and citations omitted). Under 8 C.F.R. § 1003.2(a),

> [t]he [BIA] may at any time reopen or reconsider . . . any case in which it has rendered a decision. A request to reopen . . . must be in the form of a written motion to the [BIA]. *The decision to grant or deny a motion to reopen or reconsider is within the discretion of the [BIA] .... The [BIA] has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.*

8 C.F.R. § 1003.2(a) (formatting and emphasis added). Under 8 C.F.R. § 1003.2(c)(1),

> motion to reopen proceedings shall not be granted unless it appears to the [BIA] that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing.

8 C.F.R. § 1003.2(c)(1)."[T]he motion to reopen shall be filed within 90 days ofthe date of entry of a final administrative order of removal." 8 U.S.C. § 1229a (c)(7)(C)(i); *see also* 8 C.F.R. § 1003.2(c)(2) ("[A] party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened."). "Motions for reopening of immigration proceedings are [generally] disfavored," *Doherty*, 502 U.S. at 323, because "[t]here is a strong public interest in bringing

litigation to a close [ ] promptly," *Abudu*, 485 U.S. at 107.

B. The First Motion to Reopen

The BIA dismissed Petitioners' appeal for failure to file the brief on July 28, 2005. Under 8 U.S.C. § 1229a(c)(6)(C)(i),a "motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(6)(C)(i). The record shows that the motion to reopen was filed on August 31, 2005, approximately one month after the BIA dismissed the case. Contrary to the BIA's finding, the record indicates that Petitioners' motion to reopen was filed within the ninety-day statutory time period.

Nevertheless, in the motion to reopen, Petitioners requested thatthe BIA accept a brief more than four months after the April 20, 2005 filing deadline. Petitioners' explained that they waited four months to file the brief because Paruch had surgery for prostate cancer and could not prepare the brief. The BIA found that the only document Petitioners submitted in connection with Paruch's surgery was a hospital record which indicated that Paruch was admitted to the hospital on April 5, 2005, and discharged on April 7, 2005. Since the record did not contain any information about the length of Paruch's

recovery period or the extent of his incapacitation after the surgery, the BIA found that Petitioners' contention that Paruch could not file the brief was unsubstantiated. Petitioners simply cannot show that the BIA' s decision was an abuse of discretion because the brief was due on April 20, 2005, and Paruch may have been able to submit the brief after his surgery. Even if Paruch was incapacitated by the surgery, Petitioners could have requested an extension of time to file the brief. We find that the BIA did not abuse its discretion in denying the first motion to reopen because Petitioners failed to substantiate their claim that the brief could not have been filed on a timely basis.

C. The Second Motion to Reopen

The BIA denied the second motion to reopen because "[an] alien may [only] file one motion to reconsider a decision that the alien is removable from the United States." 8 U.S.C. § 1229a(c)(6)(A). "The [second] motion to reopen exceed[ed] the numerical limitations for motions to reopen." (J.A. 10) Petitioners also "failed to meet the requirements for making an ineffective assistance of counsel claim" because they did not "provide either an affidavit in support of their motion or any evidence that they

have given [Paruch] an opportunity to respond to their allegations."

Id.

In *Matter of Lozada*, the BIA set forth procedures for asserting an ineffective assistance of counsel claim, 19 I. & N. Dec. 637, 639 (BIA 1998). In pertinent part, *Lozada* provides that:

> A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts . . . that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the [BIA], former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal respon-

> sibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.
>
> *The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board*

Id. (emphasis added). This Court has found that "[s]ound policy reasons support compliance with the *Lozada* requirements." *Hamid v. Ashcroft*, 336 F.3d 465, 469 (6th Cir. 2003). "The requirements facilitate a more thorough evaluation by the BIA and discourag[e] baseless allegations." *Id.* (internal quotation marks and citation omitted) (alteration in original). The "failure to comply" with the *Lozada* requirements "results in a forfeiture of [the] ineffective-assistance-of-counsel claim." *Id.*

Petitioners argue that Azzam complied with *Lozada*, but concede that the secon~ motion to reopen "failed to include proof that he complied with the [*Lozada*] procedural requirements." (J.A. 118) Azzam's actual compliance with *Lozada* does not cure Petitioners' failure to include proof of compliance.

Lozada expressly requires the submission of an affidavit and supporting documentation. The BIA did not abuse its discretion in denying the second motion to reopen because no evidence of compliance with *Lozada* was before the BIA when it denied the motion to reopen.

D. The Third Motion to Reopen[7]

In the third motion to reopen, Petitioners sought to introduce new evidence of compliance with *Lozada* and raised new allegations of ineffective assistance of counsel against Azzam. The BIA found that the third motion was numerically barred, and that Petitioners failed to show that they provided Azzam with an opportunity to respond. to the allegations of ineffective assistance.

Admittedly, the record indicates that Petitioners notified Azzam of their allegations on

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[7] Petitioners' third motion was a motion for reconsideration. The BIA construed the motion as a motion to reopen because Petitioners raised new ineffective assistance of counsel claims against Azzam. *See, e.g., Matter of Cerna*, 20 I.&N. Dec. 399, 400 (BIA 1991) (holding that if a motion for reconsideration raises new arguments or evidence that was not previously in the record, it should be construed as a motion to reopen.).

March 15, 2006. However, the third motion to reopen, which included allegations of Azzam's ineffective assistance, was filed on March 17, 2006. "Even if [Petitioners] [ ] presented evidence that [they] notified" Paruch of their allegations, Petitioners have "failed to meet *Lozada's* requirement that counsel be provided an opportunity to respond before filing the motion to reopen." *Asaba v. Ashcroft*, 377 F.3d 9, 12 (1st Cir. 2004) (citation omitted). Because Petitioners filed the motion two days after notifying Azzam, they "afford[ed] [Azzam] no opportunity to furnish a timely response and thus sidestepp[ed] *Lozada's* requirement to submit any subsequent response from counsel with the motion to reopen." *Reyes v. Ashcroft*, 358 F.3d 592, 594 (9th Cir. 2004) (internal quotation marks and citation omitted). Simply put, two days were not sufficient to provide Azzam with an opportunity to respond to the ineffective assistance allegations: *See, e.g., Asaba*, 377 F.3d at 12 (finding that "three days does not provide [counsel] an adequate opportunity to respond to the allegations.") (internal quotation marks and citation omitted). Therefore, we find that the BIA did not abuse its discretion in denying the third motion to reopen.

III. Petitioners' Ineffective Assistance of Counsel Claims

Petitioners argue that the BIA erred in denying the motions to reopen because their ineffective assistance of counsel claims have merit. Contrary to Petitioners' averments, the ineffective assistance of counsel claims are meritless.

A. The Legal Framework for Ineffective Assistance of Counsel Claims in Immigration Cases

Since "[i]mmigration proceedings [ ] are civil, rather than criminal, in nature[,] [ ] the Sixth Amendment guarantee of effective counsel does not attach." *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). "Nonetheless, petitioners in deportation proceedings enjoy Fifth Amendment Due Process protections." *Id; see also Dokic v. INS*, No.92-3592, 1993 WL265166, at *3 (6th Cir. July 15, 1993) (unpublished case). Ineffective assistance of counsel could constitute a denial of due process "if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988) (internal quotation marks and citations

omitted); *see, e.g., Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001) ("[W]here counsel does appear for the respondent, incompetence in some situations may make the proceeding fundamentally unfair and give rise to a Fifth Amendment due process objection.") (citation omitted); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) ("[C]ounsel at a deportation hearing may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.") (internal quotation marks and citation omitted); *Ramirez-Durazo v. INS*, 794 F.2d 491, 499-500 (9th Cir. 1986).

In the instant case, the record clearly shows that Paruch missed the deadline for filing the appeal brief with the BIA, and waited more than four months - until the BIA dismissed Petitioners' appeal- to request that the BIA accept the untimely brief. Admittedly; Paruch's conduct strongly suggests that Paruch's representation failed to satisfy professional standards. However, to establish ineffective assistance of counsel Petitioners must have "a viable claim for discretionary relief." *Cortez-Herrera v. Gonzales*, No. 04-75735, 2007 WL 1482395, at *1 (9th Cir. May 22, 2007) (unpublished case). Petitioners must be prejudiced by counsel's ineffective assistance.

"The alien carries the burden of establishing that ineffective assistance of counsel prejudiced him or denied him fundamental fairness in order to prove that he has suffered a denial of due process." *Huicochea-Gomez v. INS*, 237 F .3d 696, 699 (6th Cir. 2001) (citation omitted) (expressly holding that the BIA' s failure to accept an untimely brief does not amount to a denial of due process because petitioners were ineligible for cancellation of removal); *see also Sako*, 434 F.3d at 865 ("[T]he loss of a right to appeal the BIA's decision to this court and the accrual of unlawful presence do not constitute prejudice under this circuit's law.") (citation and internal quotation marks omitted) (alteration in original); *Komi v. Gonzales*, 186 F. App'x 597, 601 (6th Cir. 2006) (noting that "even if Petitioners' ineffective assistance of counsel claim had met the *Lozada* requirements, they would still be required to show prejudice. The loss of the right to appeal is not sufficient prejudice; Petitioners must show that, but for their counsel's ineffective assistance, they would have been allowed to remain in the country.") (citation omitted). In this case, Petitioners cannot show that Paruch's and Azzam's ineffective representation constitutes prejudice because their asylum claims are meritless.

The merits of Petitioners' asylum claims will be discussed below .

B. The Legal Framework for Asylum Claims

To be eligible for asylum, an alien must present evidence of actual past persecution, or have a well-founded fear of future persecution on account of race, religion, nationality, membership of a particular social group or political opinion. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *Singh v. Ashcroft*, 398 F.3d 396, 401 (6th Cir. 2005); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 (1987). An alien who satisfies the burden of showing past persecution is presumed to have a wellfounded fear of future persecution. 8 C.F.R. §§ 108.13(a) and 208.13(b)(1)(i); *see also Ouda v. INS*, 324 F.3d 445, 455 (6th Cir. 2003). The fear of persecution must be both subjectively genuine and objectively reasonable. *Mikhailevitch v. INS*, 146 F.3d 384, 389 (6th Cir. 1998). The fear of persecution may be established either through the production of specific documentary evidence or by credible and persuasive testimony. *Id.* Past persecution does not require corroborative evidence, *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998), because an applicant's "testimony ... if credible, may be sufficient to sustain the burden of

proof without corroboration," 8 C.F.R. § 1208.13(a); *see also Hassan v. Gonzales*, 403 F.3d 429, 434 (6th Cir. 2005).

The IJ's credibility determinations are considered findings of fact, and are reviewable under the substantial evidence standard and "are treated as conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Hassan*, 403 F.3d at 434 (quotation and citation omitted); *see also Abay v. Ashcroft*, 368 F.3d 634, 637 (6th Cir. 200.4). Although the IJ's credibility finding is afforded substantial deference, the finding should be supported by specific reasons. *Daneshvar v. Ashcroft*, 355 F.3d 615, 623 n.7 (6th Cir. 2004). "An adverse credibility finding must be based on issues that go to the heart of the applicant's claim," *Sylla v. INS*, 388 F.3d 924, 926 (6th Cir. 2004), and cannot be based on irrelevant inconsistencies, *Daneshvar*, 355 F.3d at 623 n.7. The IJ's determination with respect to the availability of corroborating evidence cannot be reversed unless the Court finds that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable. INA § 242(b)(4), 8 D.S.C. § I 252(b)(4).

C. The IJ's Credibility Determination

Petitioners contend that they suffered past persecution in Kosovo on the basis of their political opinion and membership in the Democratic Party. In pertinent part, Petitioner argues that he was interrogated, detained, and beaten by Serbian police officers on numerous occasions. He alleges that his encounters with Serbian police resulted in injuries and that his wife was raped by Serbian police. Petitioners maintain that their testimony at the evidentiary hearing and corroborating evidence established their past persecution in Kosovo and support a reversal of the BIA decision. We find that Petitioners have failed to meet their burden of showing that they endured past persecution because their hearing testimony was vague and unsupported with independent evidence.

1. The Nature and Quality of Petitioners' Testimony

The IJ identified specific inconsistencies in Petitioner's testimony that conflict with his asylum application. For example, in the asylum application, Petitioner indicated that he was "a member of the LDK [political party]." (J.A. 45) However, during the evidentiary hearing, Petitioner stated that "not only he was a member, but he was the leader ... he got a

promotion when he got his membership for this organization in his home village, and that he had thousands of people that he led." (J.A. 46) Petitioner proffered only vague and conclusory statements in support of this assertion, and failed to provide specific facts and details concerning the nature of his leadership role.

Although Petitioner claimed to have been interrogated, arrested, detained, and beaten on numerous occasions by Serbian police, he failed to proffer specific or detailed testimony concerning his alleged persecution in Kosovo; he was simply unable to explain or describe the circumstances surrounding his persecution. *See, e.g.*, J.A. 62 (noting that when Petitioner "was queried about his interrogations with the police .... he could not estimate the number of times; just many times."); J.A. 63 (noting that "[Petitioner] was asked [ ] how often [he was] questioned about the [political] party and [his] brothers" and he responded that "[he] cannot remember."); J.A. 63 ("When asked how often" he was beaten by the police, "[Petitioner] said, 'very' .... [and] refused to even estimate the number of times."). Petitioner failed to articulate meaningful responses to the questions he was asked at the hearing. Indeed, the record shows that Petitioner's testimony was

cursory and without meaningful elaboration, and did not reveal details of, or insight into, why or how Petitioner was detained; his treatment during his detentions; the conditions of his detentions; and the questions he was asked during his interrogations. Petitioner's testimony is plainly vague and ambiguous. As the IJ stated, Petitioner's testimony about his past experiences in Kosovo was "vague and his memory [was] completely off base." (J.A.63) We find that the IJ properly denied the asylum applications because Petitioner's vague, conclusory and inconsistent statements support a finding that his testimony was not credible.

2. Independent Evidence

The IJ concluded that Petitioner failed to corroborate his testimony with independent evidence. The record indicates that Petitioner produced some independent evidence, including the testimony of his brothers and a statement, or letter, from his parents.

Although Petitioner's brothers testified on behalf of Petitioners, they offered only vague and conclusory testimony about Petitioner being "almost beat [ ] to death" and Petitioner's wife being "sexually abused." (J.A. 57) The testimony did not provide specific facts or details to corroborate Petitioner's alleged persecution. Rather, the brothers' testimony

raised facts not discussed in the asylum applications. *See, e.g., id.* (noting that the asylum applications do not "mention[ ] any discrete harm, injury, abuse to the wife directly" and that the brothers' testimony was "the first mention of anything that would indicate that [Petitioner's] wife ... had been sexually abused in any manner."). Since the testimony proffered by Petitioner's brothers does not support the allegations set forth in the asylum applications, the testim,ony cannot be given· great weight.

With respect to the statement from Petitioner's parents, the IJ found that the letter "completely torpedoes [Petitioner's] credibility." (J.A. 55) TheIJ found that the statement was "fraudulent, false, and the' applicant should have known that if he had even read the letter when it came in." *Id.* He indicated that the provenance of the statement was suspect and that Petitioners "could not tell the Court whether th[e] [statement] ha[d] ever been mailed to the United States." (J.A. 54) Indeed, the record shows that although Petitioner's parents live in Kosovo, "th[e] document was faxed from Italy," and that "[n]o one could explain [ ] how [it] was faxed from Italy." *Id.* The contents of the statement also contradicted Petitioner's testimony because it indicated that

> in the year of 1999 and in order to avoid being conscripted by the KLA ... (petitioner] has moved illegally to the United States. It also says that during and after the war [Petitioner] has been chased by the KLA . . . in order to become a member of [the KLA], whereas after the war . . . [Petitioner has been chased by the KLA] as a fugitive and deserter.

(J .A. 55) Petitioner did not leave Kosovo in 1999, he left in 1998; and he is seeking asylum because of alleged persecution perpetrated by the Serbian law enforcement authorities in connection with his political activities with the Democratic Party, not because of KLA persecution. Petitioner failed to reconcile these inconsistencies at the evidentiary hearing.

The record shows that Petitioners failed to adequately connect the corroborating evidence to their testimony. Simply put, Petitioners failed to proffer adequate independent evidence to corroborate their allegations of past persecution. We find that independent evidence fails to substantiate Petitioners' testimony. The IJ properly denied Petitioners' asylum applications because the testimony lacked meaningful independent evidence.

D. Reasonable Fear of Future Persecution

In this case, Petitioners are not entitled to a rebuttable presumption that they have a well founded fear of future persecution because Petitioner failed to establish past persecution. 8 C.F.R. § 208.13 (b)(l)(I); *see also Ouda*, 324 F.3d at 455. Since Petitioner "did not sustain his burden of establishing that he suffered past persecution, he [is] not entitled to the presumption under 8 C.F.R. § 208. 13(b)(1)(i) ofa well-founded fear of suffering future persecution." *Mikhailevitch*, 146 F.3d at 389; *see also Ouda*, 324 F.3d at 455.

E. Application for Withholding of Removal

To be eligible for withholding of removal, Petitioners must show that it is more likely than not that they will be persecuted on account of race, religion, nationality, membership in a particular social group or political opinion. *See, e.g.*, 8 U.S.C. §1231(b)(3); *see also* 8 C.F.R. § 1208.16(b). "[I]n order to qualify for withholding of removal, the petitioner[s] must establish that there is a clear probability that [they] will be subject to persecution if forced to return to [Kosovo]." *Sarr v. Gonzales*, 485 F.3d 354, 361-62 (6th Cir. 2007) (internal quotation

marks and citations omitted). Petitioners "must demonstrate that it is more likely than not that he or she will be persecuted upon return" to Kosovo. *Id.* (internal quotation marks and citations omitted). Petitioners have failed to set forth specific facts and evidence that they have suffered past persecution. The testimony does not support a finding that Petitioners have a well-founded fear of future persecution. Therefore, we find that any relief under withholding of removal was properly denied.

F. Application for Protection Under the Torture Convention

Under the Torture Convention, Petitioners have the burden of showing that it is more likely than not that they will be tortured. 8 C.F.R. § 1208. 16(c)(2); *see also Ali v. Reno*, 237 F.3d 591, 596 (6th Cir. 2001). In pertinent part, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any

> reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 1208.18(a); *see also Mostafa v. Ashcroft*, 395 F.3d 622, 625 (6th Cir. 2005). The Torture Convention prohibits the return "of an alien to a country where it is more likely than not that he will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *In re G-A-*, 23 I.&N. Dec. 366, 367 (BIA 2002) (citations omitted). Petitioner argues that he was interrogated and beaten by Serbian police officers on numerous occasions, and that his wife was raped. Since the testimony concerning the detentions, interrogations, beatings, and rape was vague and unspecific, Petitioners have failed to meet their burden of proof that they were tortured in Kosovo. *See, e.g., Neziraj v. Gonzales*, 207 F. App'x 550, 559 (6th Cir. 2006) (unpublished case). We find that any relief under the Torture Convention was properly denied.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the BIA's decision and **DENY** the petitions for review.

ALICE M. BATCHELDER, Circuit Judge, concurring. I concur in full with Sections I and II of the lead opinion, discussing the BIA's denial of Petitioners' three motions to reopen. I agree with the lead opinion's conclusion that Petitioners did not satisfy the procedural *Lozada* requirements for bringing an ineffective assistance of counsel claim in an immigration proceeding. Because it is clear that Petitioners did not comply with the *Lozada* requirements, I find it unnecessary to reach the merits of Petitioners' ineffective assistance claim and do not join the lead opinion's discussion of the merits, found in Section III.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A79 582 591 - Detroit Date: May 04, 2006
A79 582 592
A79 582 593

In re: KRIST NIKOLBIBAJ
DONIKA NIKOLBffiAJ
LINDITA NIKOLBIBAJ

IN ASYLUM PROCEEDINGS PURSUANT TO 8 C.F.R. § 1208.2(c)

MOTION

ON BEHALF OF RESPONDENTS:
Marshall E. Hyman, Esquire

ON BEHALF OF DHS:
Frank E. Ledda
Assistant District Counsel

APPLICATION: Reconsideration and reopening

ORDER:

PER CURIAM. This case was last before this Board on February 21, 2006, when we denied the respondents' motion to reopen alleging ineffective assistance of previous counsel as numerically "barred and not meeting the criteria set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), for establishing such a claim. The record reflects that on November 22, 2005, the Board had denied the respondents' prior motion to reopen dated August 31, 2005. On March 21, 2006, the respondents filed what is termed a motion to reconsider but is more accurately described as a motion to reopen again alleging ineffective assistance of counsel. The Department of Homeland Security has filed an opposition to the respondents' motion to reopen. The motion will be denied.

If the respondents' motion were treated as one to reconsider, denial would be appropriate. When deciding a motion to reconsider, the Board considers the case as though the decision in the case on the record before us had never been entered. If the respondent was eligible for relief at the time of the original decision, then in reconsidering the decision, we treat his status as that which it had been at the time of the initial decision. "The very nature of a

motion to reconsider is that the original decision was defective in some regard." *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). We have reviewed the record, as well as both the Immigration Judge's and this Board's prior decisions. The respondents have failed to show any particular errors of fact or law in our decision that would warrant reversal. *See* 8 C.F.R. § 1003.2(b)(1). We considered the arguments as to ineffective assistance of counsel included in this motion regarding the actions of their former attorney, David Paruch, before rendering a decision in this case and decline to revisit them. Therefore, we find reconsideration is not warranted on that basis.

The respondents' motion can be more accurately described as a motion to reopen because it seeks to introduce new previously unavailable evidence, and raises new allegations of ineffective assistance of counsel.

At the outset, we note the motion to reopen exceeds the numerical limitations for motions to reopen. The regulations provide that motions to reopen shall be limited to one motion to reopen, with certain exceptions not pertinent here. *See* 8 C.F.R. § 1003.2(c)(2). The respondents' third motion to reopen would therefore appear to be barred by numerical limitations.

We observe, however, in the motion now before us, the respondents raise an ineffective assistance of counsel claim with reference to the actions of Hani Alex Azzam, the attorney who had filed their previous motion to reopen alleging ineffective assistance of counsel. As we stated in *Matter of Lozada, supra*, when allegations of a denial of due process are premised on a claim of ineffective assistance of counsel, especially in light of the fact that the Board receives many such claims, the alien must meet the three specified criteria in order to assist the Board in assessing the validity of the claim. The second of those criteria is that "before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond." *Id* (emphasis added). We observed that this requirement exists to provide attorneys "whose integrity or competence is being impugned, [the opportunity] to present [their] version of events," if they choose to do so, and serves to discourage baseless allegations. *Id*. The lead respondent has failed to comply with this critical *Lozada* requirement.

While the lead respondent indicates that he submitted evidence that he filed a complaint with the

Office of the Bar Counsel of the State of Massachusetts concerning his former counsel's performance, on March 15, 2006, he has provided no evidence that he informed former counsel of the allegations against him with sufficient time to allow him the opportunity to timely respond before filing his motion with the Board on March 21, 2006. *See Matter of Lozada, supra* at 639. Notice to the attorney whose actions are being challenged, with sufficient time to respond, is a central element in this Board's capacity to adjudicate "ineffective assistance of counsel" claims. Consequently, as the lead respondent has not complied with this critical requirement for reopening based on a claim of ineffective assistance of counsel, he has not established that reopening is warranted on that basis, and the motion will be denied.

Accordingly, whether treated as a motion to reconsider or as a motion to reopen, the motion is denied. Further, in view of our disposition fo the respondents' motion, the request for a stay of removal will also be denied.

FURTHER ORDER: The request for a stay of removal is denied.

/S/ Roger Pauley

FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A79 582 591 - Detroit Date: Feb. 21, 2006
A79 582 592
A79 582 593

In re: KRIST NIKOLBIBAJ
DONIKA NIKOLBIBAJ
LINDITA NIKOLBIBAJ

IN ASYLUM PROCEEDINGS PURSUANT TO 8 C.F.R. § 1208.2(c) MOTION

ON BEHALF OF RESPONDENTS:
H. Alexander Azzam, Esquire

ON BEHALF OF DHS:
Frank E. Ledda
Assistant District Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. This case was last before this Board on November 22, 2005, when we denied the respondents' motion to reopen dated August 31, 2005. On December 20, 2005, the respondents filed a

second motion to reopen before the Board of Immigration Appeals. The Department of Homeland Security has filed an opposition to the respondents' motion to reopen. The motion will be denied.

The motion to reopen exceeds the numerical limitations for motions to reopen and will be denied. The regulations provide that motions to reopen shall be limited to one motion to reopen, with certain exceptions not pertinent here. *See* 8 C.F.R. § 1003.2(c)(2). The respondent's second motion to reopen is therefore barred by numerical limitations.

Next, the respondents raise an ineffective assistance of counsel claim on appeal. However, the respondents have failed to meet the requirements for making an ineffective assistance of counsel claim as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), which requires that the alien must layout, in a detailed affidavit, the agreement between the alien and the representative; the alien must give the representative the opportunity to respond to the allegation of ineffectiveness, and the alien must file a complaint with the appropriate disciplinary authority or adequately explain why no filing was made. *See also Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). In this case, the respondents

have failed to provide either an affidavit in support of their motion or any evidence that they have given former counsel an opportunity to respond to their allegations. Accordingly, the motion is denied. The request for a stay is also denied.

/s/ Anthony C. Moscato
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

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File: A79 582 591 - Detroit Date: Nov. 22, 2005
A79 582 592
A79 582 593

In re: KRIST NIKOLBIBAJ
DONIKA NIKOLBIBAJ
LINDITA NIKOLBIBAJ

IN ASYLUM PROCEEDINGS PURSUANT TO 8 C.F.R. § 1208.2(c) MOTION

ON BEHALF OF RESPONDENTS:
David H. Paruch, Esquire

ON BEHALF OF DHS:
Frank E. Ledda
Assistant Chief Counsel,

APPLICATION: Reopening; reconsideration

ORDER:

PER CURIAM. This case was last before us on July 28, 2005, when we summarily dismissed the applicants' appeal for failure to file a brief. On August 31, 2005, the applicants filed a motion to reopen requesting that we consider their late-filed brief. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the motion. The applicants' brief was originally due March 30, 2005. However, upon their request, we extended the filing deadline to April 20, 2005. The applicants' attorney contends that he underwent prostate surgery around the time the brief was due and that he was notable to complete the brief while recuperating from his surgery. Inasmuch as it appears that the applicants are requesting that we reconsider our prior decision, we find that the request for reconsideration was filed more than 30 days after our decision and, therefore, is untimely. *See* 8 C.F.R. § 1003.2(b)(2). Moreover, inasmuch as the applicants' brief was not timely filed, we find no error off act or law in our prior decision. *See* 8 C.F.R. § 1003.2(b)(1). To the extent that the applicants' attorney now contends that he was unable to timely file the brief and that we should accept the late-filed

brief, we find that reopening is not warranted. The motion includes a copy of a hospital record showing that the applicants' attorney was admitted to the hospital on April 5, 2005, and discharged on April 7, 2005. The motion does not specify the length of the attorney's recovery period. Lastly, the motion does not explain why the applicants waited more than 4 months after the brief was due to flle the request to consider the late-filed brief. Accordingly, the motion is denied.

/s/ Roger Pauley
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A79 582 591 - Detroit Date: July 28, 2005

In re: NIKOLBIDAJ, KRISTIN

ASYLUM PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
PARUCH, DAVID H.

ORDER:

PER CURIAM. The appeal is summarily dismissed under the provisions of 8 C.F.R. § 1003.1 (d)(2)(i)(E). The appellant checked the block on the Notice of Appeal (Form EOIR-26) indicating that a separate written brief or statement would be filed in support of the appeal. This block is immediately followed by a clear warning that the appeal may be subject to summary dismissal if the appellant indicates that such a brief or statement will be filed

and, within the time set for filing, fails to file the brief or statement. The appellant was granted the opportunity to submit a brief or statement in support of the appeal. However, the record indicates that the appellant did not file such brief or statement, or reasonably explain the failure to do so, within the time set for filing. Accordingly the appeal is summarily dismissed under the provisions of 8 C.F.R. § 1003.1 (d)(2)(i)(E).

/s/ Fred Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Detroit, Michigan

File Nos.: A 79 582 591
A 79 582 592
A 79 582 593

May 14, 2004

In the Matters of	)	
	)	
KRIST NIKOLLBIBAJ	)	IN ASYLUM
DONIKA NIKOLLBIBAJ	)	ONLY
LINDITA NIKOLLBIBAJ	)	PROCEEDINGS

Applicants

CHARGE: N/A

APPLICATIONS: Asylum and withholding of removal.

ON BEHALF OF APPLICANTS:
David H. Paruch, Esquire

ON BEHALF OF DHS:
Thomas O. Martin
Associate Chief Counsel

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Background

The three applicants are ethnic Albanians who are also Catholic. Their background will be addressed in the evidentiary portions of the decision below. They all entered the United States, or were admitted to the united States, with fraudulent Slovenian passports at New York City on December 30, 1998. They were also placed into this asylum only hearing with the publication and concomitant service of a referral to the Immigration Judge. The referral notices have been marked as Exhibits 1, 1-A and 1-B, respectively, in the order in which they appear in the heading of this decision, above. They were placed into this asylum only proceeding because they were visa waiver pilot program participants, and they were placed in these proceedings after the filing of an asylum application.

The asylum application in question is Exhibit 2. It reflects that applicant initially attempted to file his application exactly one year after his arrival, and is the lead applicant, Krist, and that was on December 30, 1999. It was unsuccessful. The record apparently was returned to applicant or applicant's

counsel. It was re-returned to the Service on January 6, 2000, and apparently again was returned, and ultimately was not filed until September 17, 2001.

Before this Court, the lead applicant is seeking asylum and withholding of removal: asylum, pursuant to Section 208 of the Act; withholding, pursuant to Section 241(b) (3) of the Act; and, third and lastly, withholding pursuant to the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, Torture Convention), pursuant to 8 C.F.R. 1208.16. of course, this application includes all of the named applicants as a spouse or child of an applicant who has been granted asylum may, if not otherwise eligible, be granted the same status as the principal alien.

Now, inasmuch as this application primarily focuses upon the male adult applicant, this decision will primarily focus upon him with references to other family members as well as his wife and child where necessary and/or appropriate.

Applicant, with the assistance of his current counsel, filed a supplementary application for asylum with the Court. This is at Exhibit No.3. After this had been filed with the Court, applicant appeared before the Court, was fully apprised of the

consequences of knowingly filing a frivolous application for asylum, made many changes to the asylum application supplement as found at Exhibit No.3, and then signed his application under oath, and then the hearing on the merits commenced.

Firm Resettlement

It is the Government's position that the lead applicant is ineligible to apply for asylum, as he had been firmly resettled in Austria.

An applicant cannot apply for asylum if he "was firmly resettled in another country prior to arriving in the United States." INA Section 208 (b)(2)(A)(vi). Applicant would be firmly resettled if prior to arrival in the United States, he entered another country, with or while in that country received an offer of permanent resident status, citizenship or other type of permanent settlement. 8 C.F.R. 1208.15. Ali v. Reno, 237 F.3d 591 (6th Cir. 2001). Once the issue of firm resettlement has been raised, applicant has the burden of demonstrating he has not been resettled. See, for example, Abdalla v. INS, 43 F.3d 1397, 1400 (10th Cir. 1994); see also 8 C.F.R. 1240.8(d).

The Court notes that in applicant's initial asylum application that was filed administratively, albeit somewhat late, with the assistance of Mr.

Paruch, applicant said that he had applied for asylum in Austria, and in his testimony at least said that they had lived in Austria five or six years along with many other asylees. In an application filed at Exhibit No.2, applicant swore to or said that they left while this application was pending.

At the application as found at Exhibit No.3, the applicant deleted the reference to the application being pending; but he did not give the Court the outcome of the application. So, the negative implication was, is that they left before it was adjudicated. The Court notes that one of the matters that applicant clarified was in that same paragraph that talked about filing the application and not listing an outcome. The word surreptitiously was deleted. So, applicant's attention had been specifically drawn to that area of that application, and he elected not to make it more specific.

In applicant's testimony, he said that not only did they apply for asylum, but the asylum was denied them and that's when they came on to the United States. Applicant also averred that he got a statement, or a document or a letter, reflecting that the application had been denied. He also indicated that he had gotten an ID card from the Austrian

government, and yet he left all of those documents in Austria.

The Court finds that applicant's vacillating story with respect to getting asylum or not getting asylum or having it denied in Austria raised the possibility that applicant had become permanently resettled in Austria; and as applicant has not demonstrated he was not firmly resettled - the Court notes that applicant hasn't proven much of anything, given the completely changing nature of his testimony - the Court is obligated to find that he has not met his burden of proof. And, accordingly he is not eligible to apply for asylum because of this firm resettlement issue.

Nevertheless, the Court will assume, arguendo, that applicant is eligible to apply for asylum and will reject the application on two other bases.

The Timeliness of Applicant's Asylum Application

An asylum application must be filed within one year of the applicant's last entry or arrival in the United States. See INA Section 208(a) (2).

For the purposes of Section 208(a) (2) of the INA, the applicant has the burden of proving either by clear and convincing evidence that his application has been filed within one year of the date of alien's

last arrival in the United States, or to the satisfaction of the Immigration Judge that he qualifies for an exception to the one-year requirement.

As mentioned in the background section, this application was originally attempted to be filed on the last possible date. The Court notes that this was date-stamped in the INS Service Center exactly one year and one day after the applicant arrived in the United States. Obviously it was mailed prior to that time. When one can prove a mailing, which the Court is convinced here, it would be deemed filed the date it was mailed. Unfortunately, the applicant's application was returned to him and was ultimately not filed until September 17, 2001, after again rejection on January 6, 2000.

The Court notes that what applicant said in Exhibit No. 3 was, is that he did file within one year, but explained why it was late. This Court reads this as basically a confession that it was filed belatedly. In any event, whether or not applicant concedes that or not, the Court still must address whether the ultimate filing on September 17, 2001 is a timely filing; i.e., whether he qualifies for any of the exceptions.

In the statute and in the implementing regulation promulgated by the Attorney General pursuant to the powers delegated to him by Congress, there are two series of exceptions. One is called changed circumstances, something that is not appropriate here. The other line of exceptions is extraordinary circumstances. Now, the Attorney General in his implementing regulation, 8 C.F.R. 1208.4, talks about extraordinary circumstances. He says that extraordinary circumstances shall refer to events or factors directly relating to the failure to file within the one year. Such circumstances may excuse the failure to file as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the Immigration Judge that the circumstances were not intentionally created by the alien through his or her action or inaction, that those circumstances were directly related to the alien's failure to file the action within the one-year period, and that the delay was reasonable under all the circumstances.

Now, then the regulation also talks about a series of exceptions that might flow, but they are not all inclusive. One of them, of course, would be ineffective assistance of counsel. Applicant has never

made that allegation, nor has he attempted to comply with the affidavit portions of the regulation to raise that issue. The Court notes that in this particular case, the only explanation given in Exhibit No. 3 is the fact that they were required to submit additional copies.

The Court notes that for some reason those additional copies, or whatever the defect was, was not cured until September 17, 2001. Thus, while the applicant initially filed the application or attempted to file, the Court should say, the application at the one-year deadline, and a delay until January 6, 2001 would have been eminently reasonable, the subsequent delay of one and three-quarters years, which is totally unexplained, is per se unreasonable. The Court notes that one is supposed to file the application within one year of arrival, or entry, and the applicant did not file it until one and three-quarters years after it was rejected for the second time. And, accordingly, the Court finds that applicant has not demonstrated his delay was reasonable, and accordingly the application will be denied as untimely as well.

The Court will, however, for the rest of this decision, assume, arguendo, the applicant has proffered an asylum application in a timely fashion,

and the Court will also reject -the application on its merits.

The Applicant's Claims

The applicant's claims for asylum and withholding of removal pursuant to the statute and treaty are identical. Unfortunately for the applicant, they have changed over a period of time, and they include in fact matters not specifically listed even in his asylum application. The bottom line is applicant cannot tell a consistent or a straight story. The Court will only note that, inter alia, those factors ultimately relied upon are that applicant has been in the United states for a period of time; that he was a member of a political organization; he might not have served with the military wing of another political organization; that he was Catholic and he did not fight against the Serbs.

Asylum and Withholding of Removal Evidentiary Standards

An applicant for asylum o. withholding of removal bears the evidentiary burdens of proof and persuasion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985, modified, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

An applicant for asylum must demonstrate that he is a refugee within the meaning of Section

101 (a) (42) of the INA. This requires him to show that he is unwilling or unable to return to his country of nationality because of past persecution, coupled with either a showing of the likelihood of present or future persecution or for humanitarian reasons as a matter of discretion, or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. See Mogharrabi, supra. See also 8 C.F.R. 1208.13.

On the other hand, an applicant for withholding of removal pursuant to the statute must demonstrate a clear probability of persecution on account of the statutorily enumerated grounds listed above. INS v. Stevic, 467 U.S. 407 (1984). In Stevic the Supreme Court held that the terms well-founded fear and clear probability are significantly different, and the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal.

The Supreme Court has also held in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), that the terms well-founded fear and clear probability are significantly different and that the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal.

The Attorney General has codified regulations with respect to those seeking asylum. The asylum regulation is codified at 8 C.F.R. 1208.13. It provides, in part, that if an applicant has demonstrated that he has suffered past persecution, it shall be presumed that he has a well-founded fear of future persecution on the basis of his original claim. This is a rebuttable presumption, and may be rebutted by the Government demonstrating by a preponderance of the evidence either a fundamental change in circumstance such that the applicant no longer has a well-founded fear of persecution in applicant's country of nationality based upon one or more of the five statutorily enumerated grounds, or the applicant could avoid future persecution by locating to a part of the country where under all the circumstances it would be reasonable to expect the applicant to so do.

With respect to this regulatory proviso, the Court first notes that applicant is not credible. He has not demonstrated anything other than he comes from Kosovo, and he is ethnically Albanian. The Court notes that he has not demonstrated that has suffered or his family has suffered, as what he claims; that even if he has suffered what he claims happened to him, it does not rise to the level of past persecution. But even if it did, there has been a

fundamental change. Dr. Fischer's testimony notwithstanding, such that applicant no longer would have a well-founded fear of future persecution if he were to return to Kosovo.

Now, the Attorney General has also noted that there are other ways other than the rebuttable presumption proviso to show that applicant might have a well-founded fear of future persecution objectively and subjectively; and the Attorney General has further said in the same regulation that in evaluating wether the applicant has sustained his burden, the Immigration Judge shall not require the applicant to provide evidence that there is a reasonable possibility he would be singled out individually for persecution if he establishes that there is a pattern or practice of persecution of a group of persons similarly situated to him on account of race, religion, nationality, membership in a particular social group, and he establishes his own inclusion in identification which such of persons such that his fear of persecution upon his return is reasonable.

The Court notes that, of course, the applicant has not demonstrated he is a member of any such group. Again, in the Court's view, all he has demonstrated is that he is an ethnic Albanian from

Kosovo. In any event, even if one were to assume arguendo, all of the things that he tries to pigeonhole himself in, he has not demonstrated there is a pattern or practice of persecution of a group of persons similarly situated to him. Thus, he fails in this burden as well.

The Attorney General has promulgated a similar regulation with respect to those seeking withholding pursuant to the statute. It is codified at 8 C.F.R. 1208.16. It also provides in part that if an applicant has demonstrated he has suffered past persecution, it shall be presumed that his life or freedom would be threatened in the future upon his return to his home country on the basis of his original claim. Again, this is a rebuttable presumption. It may be rebutted by the Government demonstrating that there has been a fundamental change in circumstance such that the applicant's life or freedom would not be threatened on account of any of the five grounds, or that the applicant could avoid future threat to his life or freedom by locating to another part of the country where under all the circumstances it would be reasonable to expect the applicant to so do. Of course, what the Court said about this parallel provision in the asylum regulation applies equally here.

Again, this does not end the inquiry, as the applicant still can demonstrate in other fashions it is more likely than not his life or freedom would be threatened in Kosovo. And again the Attorney General has said that in evaluating whether or not applicant has sustained his burden, the Immigration Judge shall not require him to demonstrate that he would be singled out individually for persecution if he establishes that in his country of nationality there is a pattern or practice of persecution of a group of persons similarly situated to him on account of one or more of the five statutorily enumerated grounds, and he establishes his own inclusion in and identification with such group of persons, such that it is more likely than not his life or freedom would be threatened upon return to that country.

Again, what the Court said about the similar proviso in the asylum regulation applies equally here.

Before turning the Court's attention to the withholding application pursuant to the Torture Convention, the Court will note that if the Court were in a position to grant the applicant some discretionary asylum relief, the Court would not do so, because the applicant, after doing whatever he did in Austria, whether it be leaving when his application was still pending or it having been

denied, applicant was in the Federal Republic of Germany and elected not to apply for asylum. Applicant was in Holland and did not apply for asylum. And, furthermore, applicant did not even put in his application that he was in those countries. Why didn't he? Well, it was not because he was deceitful, of course; it was because I did not apply for asyium in those countries, or words to that effect. Again, the Court will deny his application as a matter of discretion because he should have applied there or any other country that he might have gone through and did not apply.

The applicant has also applied for withholding pursuant to the Torture Convention. An applicant for withholding of removal pursuant to the Torture Convention bears the burden of demonstrating it is more likely than not he would be tortured by someone who would be covered by the treaty and the implementing regulations.

In assessing whether the applicant has satisfied his burden, the Court must consider all evidence relevant to the possibility of future torture including, but not limited to, evidence of past torture inflicted; evidence that the applicant could relocate to part of the country where he would not likely be tortured; evidence of gross, flagrant, or mass

violations of human rights within the country of removal, and other relevant information about conditions in the country of removal. See, generally, 8 C.P.R. 120B.16(c).

Now, the Court is not going to define torture, primarily because the applicant is just an inherently incredible person.

Next, of course, the Court should parenthetically observe that there is no rebuttable presumption proviso for Torture Convention claims as there as for an asylum claim and as there is for withholding claims. Nevertheless, the applicant has not demonstrated, as he said, let alone been tortured in the past in Kosovo.

Credibility and Corroboration

Credibility is usually a crucial aspect of most asylum cases. In some instances, in fact, an asylum seeker does not have to have corroborating evidence to win. Mogharrabi, supra. Nonetheless, the provision of credible evidence is not optional, and applicants must satisfy their affirmative duty to corroborate their claim to the degree they can or otherwise reasonably explain their failure to do so. See, for example, Matter of B-B-, Int. Dec. 3367 (BIA 1998); Matter of S-M-J-, 21 I&N Dec. 772 (BIA 1997);

Matter of Dass, 20 I&N Dec. 120 (BIA 1989). See also Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998) .

Plus, of course, in the case, sub judice, the weaker the applicant's testimony, the greater the need for credible corroborative evidence. See, for example, Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998).

The rules on corroboration are the same for those seeking asylum and those requesting withholding under the statute and treaty. Compare 8 C.F.R. 1208.13(a) with 8 C.F.R. 1208.16(b) and 8 C.F.R. 1208.16(c) (2).

This cases cries out for corroboration. The Court notes that Mr. Paruch helped the applicant with his first asylum application as found at Exhibit No.2. It contains no discrete incidents with respect to him or his wife. It was then supplemented by this Court at a Master Calendar. No discrete incidents were listed. In fact, it is basically the same application verbatim. Applicant was then given the opportunity at the commencement of today's merits hearing, a long time in the future. Applicant made several changes, important changes, but he did not list any discrete events. His testimony was almost as ambiguous as his applications, and the corroboration he proffered was on at least one incident fraudulent,

because he presented a statement allegedly from his parents that had two blatant mis-statements, false statements on it; and even though his parents were in a position to corroborate much of his claim, they did not add anything other than the two false statements.

Next, applicant called two brothers. These brothers, unfortunately, came to the United States before the applicant had most of his difficulties at least the difficulties that caused him to come to the United States. Even their testimonies raised more concern about applicant's credibility than the solved in his favor. The bottom line is applicant's case cries out for corroboration and he has zero, zip, not a credible corroboration. Even the testimony of his wife raises serious concerns about her testimony, not to mention his testimony.

Evidence Discussion & Findings

The Court will first trace the history of applicant's asylum applications, intertwining from time to time comments about some of the testimonial evidence. The Court will then go through the documentary evidence of record, talking about current and past country conditions and the documentary evidence submitted in court, and

intertwining again from time to time the testimonial evidence.

At the conclusion of the discussion of all of these matters, the Court will then turn its attention more directly to the testimony of the five witnesses.

As mentioned above, Exhibit No. 2 is the asylum application attempted to be filed on December 30, 1999, January 6, 2000, and then ultimately on September 17, 2001. See page 1 of Exhibit No. 2. Now, this application at page 1 says that applicant last entered the United States on December 31, 1998. Now, the Court notes of course that this same date was listed in the biological information for his wife and his child found at page 3 of Exhibit No.2. This matter was, however, changed to a different date, December 30, 1998, when amending the written version, or preprinted version that was filed with the Court at a Master Calendar on July 30, 2000.

In the first application, applicant indicated that he had no status when he came to the United States; in Exhibit No. 3 as originally proffered and sworn to, it says his status was unknown.

Both of the applications, Exhibit 2 and 3, say that he is a Roman Catholic.

Next at page 2 of Exhibit No.2, applicant indicates that he went to high school in a discrete location from September of 1985 to June of 1988. Exhibit No.2 modified that, and he further modified that before signing it under oath. What he did not modify with respect to his employment history or residences in either of the applications that call for this, at Exhibit 2, page 2 or Exhibit 3, page 4, was the fact that applicant claimed that he had been in the military for one year immediately after him being in high school.

In fact the applicant, when given the opportunity in both applications pursuant to a question, were you ever in a military or paramilitary organization, did not reveal his membership in the army of, apparently, Yugoslavia, for a period of one year. The Court notes that applicant cannot even ultimately keep the dates of his enlistment and service in the army straight, and that will be addressed below.

The Court notes that each question asks for an explanation in detail. The applicant proffered no detail about just about anything. No discrete events.

In applicant's first application, Exhibit 2, pursuant to the question, Why are you seeking asylum, he said: I was arrested several times,

interrogated several more times for antigovernment activities. Notice it does not say for activities on behalf of the LDK, which he says in this application he was a member of. In any event, he then said that he was accused of being a terrorist with the KLA and of holding weapons for that group. In this testimony, basically he said, They questioned me at the police station after my arrest and during my interrogations about whether I was a member of any organization. They never came out and flat accused him of his, but this is how he explains why in his application they claimed, or someone accused him of being a terrorist. That is perhaps a reasonable explanation, and the Court's first reaction, that when he said that nobody accused him of that, probably was a little bit misleading. The Court will find that that does not really present an issue, except the applicant never testified about anybody accusing him of holding weapons for the KLA.

With respect to this political organization that he claims he was a member of, at page 5 he says: I have been a member of the LDK, as have both of my brothers who are in the United States. It is a political and peaceful organization seeking rights for ethnic Albanians.

Now, in his testimony, applicant said not only he was a member, but he was the leader of this; he got a promotion when he got his membership for this organization in his home village, and that he had thousands of people that he led. Well, if he had been a leader, one would think that information would be provided in his application. The Court views this as being a major inconsistency.

Now, the Court does note, however, that applicant was informed that Exhibit No. 2 and Exhibit No. 3 was one long continuous application; that if there were differences, the Court would go with the most recent version. Of course, the applicant obviously would have to explain any differences. Nevertheless, in his most recent application he uses the same term, member of the LDK, it says. See page 6 of Exhibit No.3. And that was never changed during the initial signing of the application immediately before the taking of the evidence.

At page 7, he talks about filing an asylum application in Austria in order to obtain food and shelter: We were briefly interviewed, and with the application "still pending when we came to the United States." Of course in applicant's second application, he does not say what happened to it. In

his testimony, he said it was denied. Again, he just cannot keep his story straight.

With respect to his route to the United States, at the last page of his application he said: We fled from Kosovo to Hungary, where we entered surreptitiously. The word surreptitiously with respect to that entry was changed at the beginning of the hearing, because that same surreptitiously appeared also in Exhibit No.3.

In any event, he then said that his family stayed there about two weeks, when they then surreptitiously entered Austria, and then we came on to the United States. What he did not say in this application was the trip to Holland and to Germany.

Turning the Court's attention now to Exhibit No.3. This is the application of course the applicant swore to as true after the applicant made a series of changes. The first change was at page 1, where he indicated he has moved since the last address in his application. In fact, all of the brothers now live in the same house that they purchased.

At page 4, the applicant said that yes, he did go to a trade school, but it was in fact a part of the high school, and therefore the Court merged those two schoolings at page 4 and then changed the date of the education in all of these schools from

September of 1985 to some time in 1990, to September of 1985 to June of 1989. In his application at this juncture, he did not change, however, the fact that he worked "odd jobs" from September of 1989 to July of 1998. Now, the Court notes that for a year during that period of time applicant was in the Yugoslav military, stationed in Yugoslavia for three months, and in Macedonia, I think it was, for nine months. Again, applicant has not revealed his military service.

Next, at page 5 of the application, there is a place for applicant to say why he is seeking asylum and withholding of removal. Despite the fact that his expert, Dr. Fischer, relied upon his religion, applicant did not say anything more about his religion other than he is a Roman Catholic, because at page 5 he did not even check the block off that he is seeking asylum or withholding based upon religion. Of course, on this same page applicant had changed in great detail other matters on that page, to include the fact that his brother Vitor had been granted a NACARA rather than an asylum application, and that this applicant feared retribution from the KLA.

Next, at page 5, applicant also changed the fact that his brother Vitor got an approval under NACARA. He also again added that he feared

retribution from the KLA. However, on this same page, like Exhibit No.2, he says: "I have been a member of the LDK." Of course in his testimony he said, I was the leader of the village and I led 10,000 members. If the applicant led 10,000 members, the Court believes it would be here. The Court does not believe it, however, because it is not here; plus, the applicant when asked to delineate his duties, could not delineate his duties with any specificity.

Next, at page 7, applicant changed the fact that he entered Hungary illegally and stayed there for two weeks. Again, however, it says: We entered Austria surreptitiously and requested asylum to obtain emergency food and shelter. And despite the fact that he changed that paragraph, he did not say here that his application was denied; he still has it up in the air. Again, he just cannot quite keep his story straight.

On page 5, even though he did apparently file his application untimely and gave the explanation for it at question 5 at page 8, he checked the block no; and when invited to change that, he declined to do so.

Lastly, at the last page of his application, there is a continuation of his siblings that was continued from page 4. Originally his application listed three brothers: two here in the United States that

applicant currently lives with in a house that they purchased; the other is Luk, who lived in the home community in Yugoslavia.

Apparently he forgot about a sister named Florina Marku, who was also now here in the United States. So, the Court was interested in why the applicant did not list his sister, and the Court asked him some preliminary questions not under oath before he signed his application. He said, Well, she came here, I am not sure, probably three or four years ago. I do not know where she lives; it is some place in Michigan. And then he left the Court with the impression that he had not seen her, basically, for at least probably three or four years, shortly after she got here; or maybe it was shortly after he got here. But it certainly was over one year.

Of course both of his brothers testified that she lives here in the Detroit area. One of them gave the Court basically a street location where she lives. Another brother gave the Court - well, he could not give the phone number; but the phone number is at the home he shares with the other two brothers, and they both indicated that they have seen, and circumstantially, indirectly, led the Court to believe that the applicant has also seen his sister within the last two or three months.

Again, the applicant cannot quite get his story straight, and the Court gets the idea that applicant was trying to hide his sister from the Court, for whatever reason.

At Exhibit No.4, we have a series of documents tabbed A through I, talking about current country conditions through the end of 2003. The first at Tab A is the Serbia-Montenegro Country Report for 2003. The Kosovo section begins at page 18. At page 18 the State Department notes that Kosovo is administered under the United Nations Interim Administrative Mission of Kosovo, the UNMIK; that UNMIK promulgated a constitutional framework for provisional self-government in Kosovo which is called the PISG. It also notes that UNMIK and PISG generally respected human rights for Kosovo's residents. It also talks of course about how KOFOR, the Kosovo Force of U.N. and NATO troops, continued to carry out its mandate to maintain internal security, which is listed first, and defend against external threats. His expert, Dr. Fischer, said that basically, initially at least, that KOFOR did not have the internal security measure, but then had since subsumed that, but does not believe that KOFOR can protect this applicant; or, at least, that is a possibility.

The second page relating to Kosovo, 19 of this report, reflects that for the year of 2003, there were no politically motivated disappearances. Page 27: Most of Kosovo's Serbs in Roma fled when Yugoslav forces withdrew had not returned by year's end. However, on July 1st, leaders of major Kosovo Albanian and non-Serb minority political parties published an open letter to internally displaced persons in Serbia, Montenegro and Macedonia urging them to return to Kosovo.

Next, at page 28: There were a number of attacks and threats against Kosovo, Albanian political leaders. Some of it by unidentified gangs appeared in certain locations. Not locations apparently that the applicant had lived in, however.

Next, at page 32, they talk about ethnic minorities. Basically what it says is that most of the violence is perpetrated by Albanian ethnics against the Serbs, and not vice versa, although there is some inter-ethnic Albanian violence.

Next, at Tab B, we have the 1999 Country Reports. The Kosovo section starts at page 21, but on page 1 of this report it notes that on March 24th, NATO forces began its air campaign against the Serbian forces, and the campaign succeeded, forcing Milosevic to withdraw his troops from Kosovo in early

June, "allowing refugees and displaced persons to return to Kosovo."

In fact, at Tab G, we have a Kosovo crisis update, which reflects that on September 1, 1999, about nine months after applicant entered the United States, of the 850,000 people, ethnic Albanians who had fled Kosovo, 772,300, or over 90 percent, had already returned. The Court does not believe that there is any reason why applicant could not have returned earlier.

The applicant proffered a series of documents at Exhibit No. 5. The first is a resume of Dr. Fischer, who is a professor of Balkan history at Indiana University and a recognized expert in Balkan politics and history.

Next we have a judgment for Xhevalin, the applicant's brother who testified. This judgment reveals that Xhevalin was convicted of some anti-government activities and was sentenced to five years imprisonment. Curiously, Xhevalin during the course of his testimony indicated he was subject to charge, but seemed to be completely and totally unaware that he had been sentenced to five years; again, raising a red flag with respect to his verity.

Speaking of verity, the applicant also provided a declaration of his parents at Tab 9. The Court notes

that there was no translation provided until immediately at the commencement of today's merits hearing. This translation completely torpedoes the applicant's credibility, and when combined with all other factors in his case, demonstrates to the Court that applicant has filed a frivolous application for asylum and the Court would urge the Board of Immigration Appeals if an appeal is taken, to find the application frivolous. The only reason this Court is not doing this is that the Court has found the applicant ineligible for asylum because of firm resettlement as well as a failure to file a timely application for asylum. But again, the statement from the parents will be addressed below.

Also attached, of course, is an article, the only article that applicant proffered with respect to recent country conditions, post-dating the 2003 report. This article is from the New York Times at Tab 2. Now, Dr. Fischer testified that things have gotten worse since the publication of the report, yet he did not offer any discrete examples. He gave some generalized examples, but did not give concrete examples. He did say that one ought to read something, but it was not this New York Times article, and that article as far as the Court knows was never proffered in this particular case.

This article by and large has nothing at all to do with the recent violence in Kosovo as described by Dr. Fischer. It talks about two American women working as prison guards for the United Nations in Kosovo being killed by an attacking prison officer who they served with, a Jordanian. So, this document is of limited help. What it does say, however, about other issues show that perhaps things are not as bad in Kosovo as painted by Dr. Fischer.

For instance, at the bottom of page 1 of this exhibit, it says there are about 3,500 United Nations police officers in Kosovo. Even Dr. Fischer said there are several police forces, but he says that perhaps they cannot function as well as they should, or words to that effect. Then they talk about at page 2 of this article that there has been violence in Mitrovika, an occasion that apparently is not related to the applicant, where ethnic Albanians attacked a Serb community. Now, note this was Albanians against Serbs, not Albanians on Albanians, and this resulted in 4,000 people being displaced and 500 homes being damaged or destroyed. So, this just shows that the State Department is right, that most of the violence is Albanian to Serbian; and, a lot of the Serbs have fled and have not returned.

Concerning now the statement from the parents. The translated version of this is found at Exhibit No.5. Now, Exhibit No. 5 is the translation plus a copy of the declaration. This copy of the declaration seems to cut off the fax transmission. The Court has not seen and, in fact, the applicant could not tell the Court whether this has ever been mailed to the United States, but what does appear, however, on the fax transmission found within Exhibit No. 5 itself as originally proffered, shows that this document was faxed from Italy. No one could explain, really, how this was faxed from Italy.

In any event, this statement signed by his parents say that the applicant, Krist, in the year of lS99 and in order to avoid being conscripted by the KLA, consequently the war in Kosovo, has moved illegally to the United States. It also says that during and after the war, this same person has been chased by the KLA during the war in order to become a member of that institution, whereas after the war, in the year 2000 as a fugitive and deserter.

Well, some of his brothers testified that, no, they had been rather recently to the home looking for him and to threaten him as well as the other brothers. Of course this does not say that. The last approach was in the year 2000. But more

importantly, the applicant said, No, in 1999 I was here; I have never been back to Kosovo; and besides, I did not flee because I feared being conscripted by the KLA. So, the two discrete incidents that they mention did not correspond with the applicant's current story or any story as found within Exhibit 2 or 3. In fact, this document completely torpedoes the applicant's credibility. This document, the Court finds, is actually fraudulent, false, and the applicant should have known that if he had even read the letter when it came in. Apparently he did not; or, if he did, he ignored its obvious deficiencies.

Next, at Exhibit No. 5-B, we have the applicant's wife's Yugoslavian passport, which indicates that yes, she, at least, went to Hungary, not surreptitiously, but legally.

Turning the Court's attention now to the testimony of the several witnesses, the first was the brother Vitor Nikollbibaj. He again is an ethnic Albanian and Roman Catholic, born in Kosovo December 29, 1964. Note he is six years different in age than this applicant, who is six years younger. He then said that he came here, and that he got his green card through an asylum office under NACARA. But he cannot remember when he came to the United States. It was either August of September of 1985. He

then related that while he was in high school, he was in the LDK, and that the Serbian police harassed us. After so many arrests and beatings, he says, and after they threatened to kill him, he left his work as an LDK foot soldier. Now, by foot soldier, he just meant an activist and not a militant, apparently.

He then said that he has four brothers. Luk is in Kosovo, and the three others are here. Apparently they all live together.

He also averred he had not been back to Kosovo, but he had been in contact with people after he left Kosovo, and basically his parents have told him it is not safe to return; they are still under Serbian control and there is nothing going on. There is no work to be had. The United Nations will not stay forever, and the KLA is punishing people who did not join it.

Who told you this? My parents. When did you talk to them? Oh, just a few days ago. He said that, yes, my dad had told me about these threats over the phone. And the threats were of course because we, none of us, fought against the Serbs.

He also testified of course that Luk cannot get a job and that he has been physically harmed, but not recently. Now, the Court notes that applicant in his testimony indicated that Luk became handicapped

after this applicant came to the United States; that is, the applicant in this case. Whereas, his wife could not keep the story straight and said, no, Luk was handicapped before we came to the United States.

In any event, this brother, Vitor, said that, yes, I talked to my brother - that is, the applicant in this case - about why the family came to the United States. He said first, they almost beat me to death, something that is not in the application; and, they sexually abused his wife, something that is not in either application. In fact, neither application mentions any discrete harm, injury, abuse to the wife directly. This is the first mention of anything that would indicate that his wife, that is, the co-applicant in this case, had been sexually abused in any manner.

And apparently these matters were told to me shortly after they arrived in the United States. In fact, they gave an emotional accounting of the wife sitting down and then saying all of this in front of the brother or brothers.

He also testified that the sister, who the applicant did not know basically where she was or how she could be contacted, lives in Sterling Heights. He gave the Court two different roads that she lives

near, which are frequent mile markers here in the area.

The next witness to testify was brother Xhevalin. He was born in May of 1969, and apparently was issued his asylum by a Judge Walsh in this court on October 29, 1997. He talked about Luk being the oldest and being in Kosovo, and how he left Kosovo, that is, this witness, in August of 1992. He then said after Vitor left, police interrogated us, and they would abuse us, they would dehumanize us and they would beat us, he says.

He then said that he belonged to an organization called WEDI Kosovo. He did not initially talk about what exactly this organization was, other than they spread mail. As it turns out, he said, well, my dad was a mailman and we used to put political things - we did not know what the political things were - in the mail and mail them certified mail, and my dad delivered them. Of course the dad's affidavit says nothing about being a mailman or having anything to do with WEDI Kosovo. Ultimately this witness testified that WEDI Kosovo had a grand total of seven members, and even though the applicant in the case, sub iudice, helped them, he was not one of the seven members. He was in fact basically too young, or words to that effect.

He then talked about how he, that is, this witness was arrested at 2:00 a.m., interrogated for over 12 hours in August of 1992, apparently, and they said, The next time we come upon you, we are going to kill you; so, that is when I decided to flee.

He then says, well, you know, they charged me, but who knows what they will do if they capture me. I think they might kill me. Of course he had every opportunity in the world to say, you know, they took me to court and I was sentenced, either directly or in absentia, to five years incarceration. See Exhibit 5, Tab 7. But he seemingly did not know a word about Exhibit 5, Tab 7. Again, this witness's credibility is completely shot.

Like his other brother, he says, I have recently talked to my parents and they have told me, I do not think it is safe for you to return. He then said that religion is a very important aspect of this formula, even though the applicant did not list religion on his application, and even though in his testimony he neglected to talk about how important religion was. Then he of course says that the LDK - or was it the KLA? He could not keep that straight. He did not know the difference between the LDK and KLA, and in fact his brother Vitor piped up at this particular juncture of his testimony and corrected him and said,

you've got it all wrong, or words to that effect. Then, of course, despite the fact that he could not get it right and did not know the difference between the LDK and the KLA, he then suddenly says, Oh, yeah, by the way, I was a member of the LDK. Again, this person just could not keep his story straight; within just seconds, gave the Court two completely different, inconsistent applications, completely destroying his credibility to the extent he ever had any.

This witness did testify, however, that, yeah, the sister, we saw her about a month or two ago, and I have her phone number at phone. But, you know, you could call her, except I left it at home.

He then indicated that, yes, he had talked to the applicant and his wife about why they came. The lead applicant said that he was abused, but gave no details other than to say, I was beaten up and, you know, I was beat up so bad I cannot remember; hardly adding to anybody's credibility. And then he said, well, you know, the wife claimed that she was raped by the Serbian police. Yeah, she told us in 1998 and she directly told me. Yet, of course, the lead applicant's position was he could not list it in either application after given the opportunity of doing so, knowing it was an important matter, to bother listing

even the fact that his wife had been abused at all, physically or else. Again, this just does not ring true.

The next witness to testify was the lead applicant. He said that when he completed high school, he was not required to perform military service. So, that question was asked again. Then he said, well, you know, I was in the military. I was a foot soldier. I was stationed in Serbia for three months and then I went to Macedonia. I was given a weapon but no ammo, and I was there for nine months and then I came home. Then he said, at that particular time I became involved with the Democratic League, and it was for peace, not war and not care. The goal was to show the world the massacres of the Albanian people at the hands of the Serbs.

He then said that he lived with his dad, his mother and his brother, apparently Luk. He was married to Lindita, the co-applicant, in 1995, and how they have two children; a daughter born in the old country, and Daniel born here. Then he was asked, Well, what did you do for the LDK? Well, with my brothers, I spread papers. Of course, he was not one of .the seven. And after my brother left in 1992, I got a membership card in the LDK.

What did you do, then, after you got this membership card? Did you do more work, he was asked? He said, Well, I was promoted; I was promoted to leader. At this juncture the Court asked the applicant to give the title, and he ultimately said, well, my title was leader of the village. Well, how big is your village? Well, it has 5,000 houses and 10,000 people, and my village were members and I was leading them. Of course if he had this preeminent and high exalted role, one would believe he would have said it in his application, and he did not. When asked how often they had meetings; Oh, two or three days a week we had secret meetings, but later on it became more than that. Well, how many people were at your secret meetings? Well, 500 to 2,000. It is hard to see how there could be a secret meeting of 2,000 people, but in any event he said, we had secret meetings.

Well, where did you hold secret meetings? He was asked the discrete location several times, and the best he could do was say, well, you know, we held it in mountains and sometimes we held it in a school. He never gave the Court any discrete location even though his own counsel and this Court asked him for a specific place; again, raising a red flag with respect to applicant's verity.

Then applicant was queried about his interrogations with the police. And he could not estimate the number of times; just many times, I was taken to the police station, they asked about what party I was involved in. Notice he did not say they accused him of being a member of any party; they just asked him what he was a member of. And then they questioned him about who the leaders were and other things about his family. Of course, he always refused to give up information, apparently.

He then was asked, Well, when did your interrogation begin, since you cannot give us any estimate of the number of times? Well, right after I was let out of the military service in September of 1989. Of course this was the date that he changed to being graduating from high school. So, the Court reminded him that that cannot be the date; that's when you graduated from high school. He said, Oh, you know, it was then either November or December of 1990. Of course applicant never in any application ever claimed to belong to any military organization; again, raising a red flag with respect to applicant's credibility.

Then he was asked about being approached again by police, and rather than addressing currently things that were being talked about, he started:

Well, you know, from the 1980s we were confronted by the police. And then he was asked, Well, how often were you questioned about the party and the brothers and so on: I cannot remember, he says. Again, like much of the rest of his testimony, it is vague and his memory is just completely off base.

When he was asked after his release, What happened to you on those occasions: Well, they beat me, they took me to the police station. Anyway, he said that after his brother left he was interrogated and arrested apparently often. When asked how often, he said, "very". Again, he refused to even estimate the number of times.

Then when he was asked when, he said, Many times. I was sometimes asleep 12 midnight and they would come into the house at those times. And there were some other times. Again, he would not even try to estimate a discrete month, let alone a discrete year, really, with any specificity.

He then said he would be taken to the police station, they would beat him with batons and kick him with feet, they would take off his shoes, beat his feet, and they would hit his hands with sticks. But other than that, he did not go into any great detail. Again, vagueness just permeates this whole case.

They asked about the party; who I worked for, who the party's leaders were, about my brothers. And then they told me they would kill my wife if I kept up working for this group, but I did not tell; and so I felt in danger, and so we then left, my wife and my daughter, to go to Hungary, Austria, et cetera.

Of course this for the first time is the place where he says, Yes, in Austria we applied for asylum, but it was denied.

This is also the first place where he told the Court that he had been in Germany or Holland.

Then he said that they KLA requested that I join them the month before I left. This of course is where the applicant further testified that nobody ever accused him of being a member of the KLA, although later he explained, well, because the police asked me about the organizations I might have belonged to, that was an accusation.

Then applicant was asked whether the Serbian police arrested or maltreated any of the other members of the family, that they carried out this threat to basically harm your family if you continued working. And this of course was an open invitation for him to say that his wife had been beaten or sexually abused or raped. He did not take the bite, however, and he basically said, well, you know, my

mom, my dad; my brother, they have been beaten. But he did not saying anything about his wife, really, at this particular point that had anything to do with sexual abuse.

Applicant then at the end of his direct exam was asked, What would happen if you would return? Of course, he did not want to return. But then he said, Well, the KLA will go after me and the Serbs will go after me.

Then on cross-examination, he was asked since he left in 1998, has the brother Luk been physically harmed. Yes, he was turned into a handicapped person. Of course this is inconsistent with other evidence.

Then he was asked why he did not apply for asylum in Hungary. Well, that is too close, basically, to Kosovo; but apparently Austria was okay, because it was. a little farther away. And they denied me and they gave me some documents, but I left all those documents including the identity card there.

Then he was asked, Well, why did you not apply for asylum in Germany? Well, I was not there that long; I had to drive through it. It took most of a day, apparently. The only thing we did was stop for gas.

Then why didn't you apply for asylum in Holland? Well, I know it was a secure country, but nevertheless I was scared and I wanted to get farther away. And so, he thought that he would come to the United States. Of course he disavows the fact that he had two brothers here as any role in his deciding to come to the United States.

He then averred that he had been in Austria for five or six months, but yet he cannot remember the date of .his first arrest. The last arrest was when they left in July of 1998. Of course his wife, when asked about the last arrest, also said July of 1998, but then said it was a month or six weeks before she was raped, which would place it in June; so, she could not even exactly get the date right, either. And even though the last arrest apparently resulted in the applicant being beaten so that he could not move for two or three weeks, he still managed to walk the 20 minutes or so from the police station in another village all the way home. Again, she could not keep her story straight about that. And the applicant's story, of course, did not corroborat.e his wife's testimony to the extent it is even believable.

Of course the applicant was asked why he did not get an affidavit from Luk. The answer was, Well, he is not in the party anymore. And when he was

asked why he could not put in his application anything about his wife's rape, he said, Well, it was "very hard for me to write it." Of course he did not write it; his lawyer or his lawyer's secretary typed it. He did not have any trouble ultimately talking about it, and she did not have any trouble talking about it, and they disclosed it to the brothers immediately upon coming to the United States. They did not have any difficulty talking about it. And he knew and he confessed that it was an important part of his application. So, the fact that he did not list it when he was given the opportunity of changing it again at the commencement of today's merits hearing, several years after he initially filed the application, just makes absolutely no sense, and, again, destroys his credibility.

Then he was queried about what his duties were as a leader. You mean, a leader, he says? What, responsibilities? Well, I had representatives to tell everybody about what the Serbs are doing. And the Court then asked him, Well, did not everybody already know what the Serbs were doing? He said, Well, then I had to educate the world. When he was given the opportunity of explaining how he was going about educating the world, the Court quite frankly

did not underst.and his answer. Again, he could not give the Court the discrete details of being a leader.

The next to the last witness to testify was the wife. She said that she was born in 1974, married in 1995, lived with a husband whose mother died and the husband's brother. She was not politically active, however. And even though she averred that applicant was politically active, would often leave the house for several hours at a time, sometimes would not even come home, she does not know what he did or how he was politically active.

This is true even after he filed the two asylum applications. Apparently they just do not talk.

She said that when he would come, he would be beaten, and that she would have to treat him with ice and water. In fact, apparently the last time, or one of the last times, he could not move for two or three weeks, and yet her testimony was he was able to walk the 20 minutes from the police station from another village, because there was no police station in their village. Again, her testimony was inconsistent within just seconds.

She then talked about how about a week before or during the week before they fled, but she again could not mention the date, how the police came to her house when her husband was at the police station

along with Luk and maybe some other people. The Court initially thought that she said that the mother-in-law was there, but then she said, well, the mother-in-law was at home. In any event, Three or four people then jumped me and raped me. Now, who was present during the rape? Well, my mother-in-law saw it, Luk saw it, and a couple of other people. Of course, did she get any affidavits? No. Even though the mother along with the father proffered an affidavit, it does not mention any maltreatment against her. Perhaps this is because it was sent by somebody from Italy and maybe not the people that it purportedly was from.

The next witness to testify was Dr. Barent Fischer, a professor from the University of Indiana. Now, the Court notes that Dr. Fischer certainly has eminent credentials. However, he has not been in Kosovo in recent time, and most of his information comes, as he said, from reading as well as to talking to people who make certain allegations that are from Kosovo. This raises some concern about his conclusions, especially since Dr. Fischer did not give any discrete examples. He just said, I know of such instances and you ought to read this article, but he did not proffer the article, and he did not even talk about the discrete incidents.

And, his testimony was replete - and I started to count and then I lost track of the times that he said - I would suggest that, or words to that effect. The "I would suggest" language hardly indicates that he has a strong belief about any of this, and leaves the Court to believe that even what he claimed might really be true was subject to some debate.

Dr. Fischer also testified that he assumed that everything that applicant and the witnesses testified to was true; if there were certain things that were not true, they would detract from the risk involved. And he testified that for a number of reasons applicant would be at risk, but did not give the Court any sort of a proportion here as to how at risk the applicant would be. We already know that some of the things applicant testified to are absolutely not true, or at least not as important as the applicant claims them to be. And, accordingly, Dr. Fischer's testimony, even if one were to take it at face value, is of marginal relevancy given the applicant's lack of credibility.

Then Dr. Fischer talked, of course, and the Court is going to address some of his concerns. He said, I would suggest that there was a chaotic situation, and sort of a mini-civil war from the 14th and 16th of March. Of course the newspaper article as proffered by the applicant, Exhibit No. 5, dealt

with an incident that happened in April, and not March.

He then said there was considerable violence. Less than 20 people died and 4,500 were driven from their homes.

He then described this as being a spontaneous uprising. Somehow the Serbs were thought to have drowned or caused the drowning, directly or indirectly, of some Albanian children, and then there was a "spontaneous uprising" and that the Albanians used this as an excuse to attack Serbian enclaves; again, not Albanian on Albanian as the applicant fears, and certainly not Serbian versus Albanian as applicant seems to fear as well.

He then of course talked about how the KLA has been officially disbanded and they are now a protection agency dealing mostly in things that are not police work.

He then says that the policy of the United States as well as the European Union is to officially recognize that Kosovo is part of Serbia-Montenegro, and assuming arguendo that these countries ever bifurcate themselves, Kosovo probably would be placed under Serbia. But of course as he said, there is no end game, so you cannot predict what is going to happen or what it is going to happen, really.

He then talked about, yes, there was retribution by KLA people who did not help them or who might be perceived as enemies. Enemies would be people who did not corroborate with the, who were believed to be anti-Serbian, or sufficiently anti-Serbian, those who left the country, and those who failed to seek political asylum. Of course, for none of these discrete types, he gave the Court no examples, lessening the verity of the impact of his testimony. Even though he said that some people have killed, he gave the Court, again, no discrete answers.

He said that the Kofor is hopefully a success, but they are not as successful as they should be. He said that there are several police forces, and he weuld "suggest" that they are not as effective as they should be.

He then talked about things that might impact er add to the applicant being at risk. One ef them, ef ceurse, is Roman Catholicism. But of course applicant never talked about him actually practicing Roman Catholicism; in fact, he did not even check it on his application. Of course he also talked about how Roman Catholicism is 7 or 8 percent of the population. Even the Country Reports do not reflect that there is any problem vis-a-vis Moslems and Roman Catholic basically in Kosovo.

In any event, he then said people who left and came to the United States, they might be perceived as wealthy or well connected. Of course, this has again got nothing at all to do with the asylum laws of this country even if it were to be true.

The bottom line is that, for a number of reasons, Dr. Fischer believed that he did not think that applicant could be protected, but again he did not say what the likelihood was that applicant would be at risk for any of these reasons, either alone or in conjunction with any other reasons, and of course he assumed all of them were true, in which of course we know is not true.

Conclusion

For the reasons discussed above, the Court notes first applicant does not have a viable application because of the firm resettlement issue as well as the timeliness issue.

Next, even if one were to believe applicant's story, take your pick, the one in the asylum application at 2, or at 3, or his testimony, or a combination of all of these, applicant has not suffered any past persecution. But assuming, arguendo, there was past persecution, almost all people in the same shoes as he, that is, Albanian ethnics from Kosovo, have returned. While there is some violence, there is

no pattern or practice of persecution of a group of persons similarly situated to him; and he certainly has not demonstrated a well-founded fear objectively of future persecution. And, more importantly, because he only has a viable withholding application, he has not demonstrated that really anybody would care about him if he returned to Kosovo, other than perhaps his parents and his brother Luk; and he certainly has not demonstrated it is more likely than not he would be persecuted or he would be tortured for any reason whatsoever. And, accordingly, his application will be denied.

For the reasons discussed above, the Court issues the following orders:

ORDERS

IT IS HEREBY ORDERED that applicant's asylum application and withholding application under the statute and treaty, as it incorporates the two remaining applicants, be denied.

/s/ Robert D. Newberry
ROBERT D. NEWBERRY
Immigration Judge